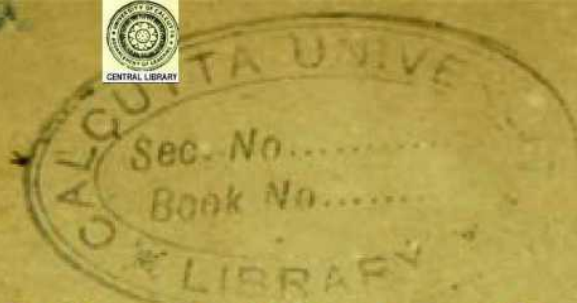




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Selection of Leading Cases

FOR THE USE OF B.L. STUDENTS

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CIVIL PROCEDURE CODE

Supplementary Cases



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	PAGE.
1. Narendrachandra Mondol and others <i>v</i> Jogendra Narain Rai and others	1
2. Chhayemannessa Bibi <i>v</i> . Basirar Rahman ...	10
3. Upendranath Kalamuri <i>v</i> . Kusumkumari Dasi ...	17
4. Ajo Koer and another <i>v</i> . Gorak Nath ...	25
5. Kartick Chandra Ghose and others <i>v</i> . Ashutosh Dhara	29
6. Punchanun Bundopadhya <i>v</i> . Rabia Bibi and others	32
7. Hukum Chand Boid <i>v</i> . Kamalanand Singh ...	42
8. Khia Rajmal and others <i>v</i> . Daim and others ...	61
9. Musammat Rashid-un-Nisa <i>v</i> . Mahammad Ismail Khan and others	73
10. Raja Mukund Deb <i>v</i> . Gopi Nath Sahu and others	78
11. Kamini Debi <i>v</i> . Promotha Nath Mukerjee and another	84
12. Malkarjun <i>v</i> . Narhari and another	89

SELECTION OF LEADING CASES.

CIVIL PROCEDURE.

NARENDRA CHANDRA MONDOL AND OTHERS.

v.

JOGENDRA NARAIN RAI AND OTHERS.

[*Reported in 19 C. W. N. 537 s. c. 20 C. L. J. 469.*]

The judgment of the Court was delivered by

June 19.

MOOKERJEE J.—This appeal is directed against a decree in a suit to enforce a mortgage security. To appreciate the questions raised herein, it is necessary to examine the relevant facts as they appear on the record.

On the 1st June, 1898, Krishna Chandra Mondol (the first defendant) and Dukh Bhanjan Mondol (since deceased and now represented by his infant sons, the second and third defendants) executed the mortgage bond in suit, in favour of Jogendra Narayan Rai and Mahendra Narayan Rai. The principal money secured was Rs. 4,999, which carried interest at $10\frac{1}{2}$ p. c. per annum and was repayable on the 12th April, 1899. On the 12th April, 1905, the mortgagees commenced the present suit to enforce their security. They joined fourteen persons as defendants. Of these, the first three were one of the original mortgagors and the two infant sons of the other mortgagor. The remaining defendants were persons, who, it was alleged, had acquired an interest in the equity of redemption by purchase, settlement, mortgage and otherwise and were consequently necessary parties as entitled to redeem the plaintiffs. On the day that the suit was instituted, the plaintiffs applied for appointment of guardian-*ad-litem* of the infants defendants, and proposed their mother as a suitable person. Notices were served upon the infants and the proposed guardian. The mother, however, did not enter appearance and signify her willingness to act as guardian of her sons. Yet the Court proceeded, at the instance of the plaintiffs, to appoint her



1914

Narendra Chandra
v.
Jogendra Narain.

guardian of the infants for the purposes of the suit. There was no appearance on behalf of the infants at any stage of the suit; but some of the other defendants filled written statements. On the 15th December, 1905, the Court proceeded to decree the suit, *ex parte* as against defendants 1, 2, 3, 10, 11, 12, 13, on a compromise as against defendants 5, 6, 7, 9, 14 and apparently on contest as against defendants 4, 8. On the 25th June, 1906, the mortgagees applied for an order absolute, whereupon notices were directed to issue upon the defendants. On the 25th July, 1906, the first defendant as also the mother of the second and third defendants applied to the Court to set aside the *ex parte* decree. They alleged that no summons in the suit had ever been served upon them, and that there were substantial defences to the claim, and they prayed that the decree might not be made absolute till the matter had been investigated. This application was made by a pleader on the strength of a Vakalatnama given by the mother of the infants on the 24th July, 1906, authorising him to take necessary steps to oppose the grant of the application for order absolute. On the 25th October, 1906, the Court dismissed the application to set aside the decree, and on the 13th November, 1906 made the decree absolute. On the 17th January, 1907, the petitioners, who had unsuccessfully applied to set aside the decree, preferred an appeal to this Court against the order dismissing their application. On the 8th January, 1908, this Court heard the appeal and set aside the *ex parte* decree as against the three petitioners and directed the suit to be reheard in so far as they were concerned. As regards the infant appellants, this Court held that they were not parties to the suit, as no guardian had ever been appointed for them in accordance with law, and they would consequently not be bound by the decree. This Court was not apprised at the time, that, during the pendency of the appeal, the decree had been executed and the mortgaged properties sold. In fact, on the 4th February, 1907, the lower Court proceeded, at the instance of the mortgagees decree-holders, to sell the properties; many of these were purchased by the decree-holders themselves; some were purchased by the defendants other than the mortgagors; a few were purchased by persons who were neither plaintiffs nor defendants and were entire strangers to the proceedings. The



sale was confirmed on the 8th April, 1907, and on various dates between April and November, 1907, possession was delivered to the purchasers. On the 24th March, 1908, that is, shortly after the *ex parte* decree had been set aside by this Court, the first three defendants applied to the Court below to set aside the sale. Petition of objection was filed by two only of the purchasers, one of whom was a party to the suit (defendant 12). On the 31st July, 1908, the Subordinate Judge dismissed the application on the ground that third parties were not affected by the cancellation of the decree. The suit, which, by order of this Court, stood revived against the mortgagors, was then taken up for retrial, and on the 16th December, 1908 they filed their written statement. On the 3rd September, 1909, the District Judge who took up the case for disposal, overruled the defences on the merits and made his decree. This decree directs the mortgagors to pay up the mortgagees within three months, and, on default, entitles the latter to take the sale proceeds of the mortgaged properties purchased by third parties in satisfaction of their decree. A provision is added that, should this prove insufficient, the mortgagees will have the right to realise the balance by sale of the remaining mortgaged properties. The decree, it will be observed, does not specify what is meant by "third party,"—whether it includes only a person who is not a party to the mortgage suit or includes all persons other than the plaintiffs mortgagees. The mortgagors defendants have now appealed to this Court, and have contended that the decree as drawn up is not in accordance with Rule 4 of order 34 of the Code and that, in the events which have happened, all the mortgaged properties should be directed to be sold afresh.

It is plain that the two infants defendants have not been affected in any way by the sale held on the 4th February, 1907, because there was at the time no valid and operative decree in force against them. They were not properly parties to the mortgage suit. It was not competent to the Court to appoint their mother as guardian *ad litem* without her express consent. The Court acted contrary to what was the established rule on the subject: *Dhoniba v. Kusa* ¹; *Babajibien v. Maruti* ²;

1914

Narendra Chandra
v.
Jogendra Narain.

¹ (1869) 6 Bom. H. C. R. 219.

² (1874) 11 Bom. H. C. R. 182.



1914

Narendra Chandra
v
Jogendra Narain.

*Issur Chunder v. Nobo Kristo*¹; *Narsingh Narain v. Jahi Mistry*²; *Bal Kishan v. Topeswar*³; *Dinabandhu v. Mashuda*⁴. The position, consequently, was that the infants were not properly before the Court, and are in no way bound by the decrees of the 15th December, 1905. The sale held under these circumstances did not pass the right, title and interest of the infants: *Khiraj Mal v. Daim*⁵; *Rashidun Nissa v. Ismail Khan*⁶; *Kishen Chunder v. Ashoorun*⁷. It is, consequently, indisputable that every one of the purchasers at the execution sale held on the 4th February, 1907, has failed to acquire the right, title and interest of the infants defendants in the mortgaged properties. Such purchasers may have imagined that the infants were bound by the decree and may have paid the purchase money on the assumption that they were acquiring the interest of all the mortgagors. But that clearly cannot affect the position of the infants who are bound neither by the decree nor by the sale consequent thereon. It is thus necessary, for the protection of the purchasers themselves, that the properties should be resold on the footing of a fresh decree binding on the infants in the suit as reconstituted.

Apart from this question, the effect of the cancellation of the decree by this Court on the 8th January, 1908, upon the sale held on the 4th February, 1907 requires examination. Two positions are clear and incontestable, namely, first, that the purchase made by the decree-holders themselves must be treated as cancelled, and, secondly, that the purchase made by persons who are not parties to the suit, must be treated as unaffected: *Nawab Zainul Abidin v. Muhammad Asghar Ali*⁸; *Jan Ali v. Jan Ali*⁹; *Chunder Kant v. Bissesur*¹⁰; *Mukhoda v. Gopal Chunder*¹¹; *Indurjeet v. Pootee Begum*¹²; *Shivalal v. Shambhuprasad*¹³; *Tanakdhari v. Gossainlal Bhaya*¹⁴; *Dorasami v. Annasami*¹⁵;

¹ (1880) 7 C. L. R. 707.² (1911) 15 C. L. J. 3.³ (1911) 15 C. L. J. 446.⁴ (1912) 16 C. L. J. 318.⁵ (1904) L. R. 32 I. A. 23; I. L. R. 32 Calc. 296.⁶ (1909) L. R. 36 I. A. 186; 10 C. L. J. 318; I. L. R. 31 All. 572.⁷ (1863) Marshall 647.⁸ (1887) L. R. 15 I. A. 12; I. L. R. 10 All. 166.⁹ (1868) 1 B. L. R. 56 A. C. J.; 10 W. R. 154.¹⁰ (1867) 7 W. R. 312.¹¹ (1899) I. L. R. 26 Calc. 734.¹² (1873) 19 W. R. 197.¹³ (1905) I. L. R. 29 Bom. 435.¹⁴ (1909) I. L. R. 37 Calc. 107 (113); 11 C. L. J. 254.¹⁵ (1899) I. L. R. 23 Mad. 306.



Chandan v. Ramdeni ¹. The question arises, however, as to the position of a purchaser who is not a stranger to the suit, but is a defendant therein. Is his position analogous to that of the plaintiff or of an absolute stranger to the proceedings? The answer to this question must depend upon the reason for the rule that a stranger who purchases in execution of a decree is not affected by the subsequent cancellation or reversal of the decree. Sir Barnes Peacock in *Nawab Zainul Abdin v. Muhammad Asghar Ali* ², refers to a passage from Bacon's Abridgment, Tit. Error (M. 3) which runs as follows: "if a man recovers damages, and hath execution by *feri facias*, and upon the *feri facias* the sheriff sells to a *stranger* a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold by the command of the writ of *feri facias*." This statement of the law is supported by a long series of early cases: *Anon* ³; *Luddington v. Amnen* ⁴; *Beverly's Case* ⁵; *Eyre v. Woodfine* ⁶; *Anon* ⁷; *Hoe's Case* ⁸; *Manning's Case* ⁹; *Drury's Case* ¹⁰; *Goodyere v. Ince*, ¹¹; *Doe v. Thorn* ¹². An examination of these cases shows that protection is afforded to the purchaser only when he is a stranger to the suit. This is clear when we examine the reasons assigned in support of the rule. Thus in *Bennett v. Hamill* ¹³; Lord Redesdale justified the rule on the principle that the stranger who purchases, has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and has on such investigation properly decreed a sale. To the same effect is the observation of Sugden L.C. in *Bowen Evans* ¹⁴. The principle was affirmed by the House of Lords in *Bowen v. Evans* ¹⁵ and *Tommey v. White* ¹⁶ and by the Supreme Court of the United States in *Gray v. Brignardello* ¹⁷, *Beauregard v. New Orleans* ¹⁸,

1914

Narendra Chandra
v.
Jogendra Narain.

¹ (1904) I. L. R. 31 Calc. 499.

² (1887) L. R. 15 I. A. 12;
I. L. R. 10 All. 166.

³ (1579) Dyer 363 a.

⁴ (1585) Godb 27; 2 Leon 92;
3 Leon 89.

⁵ (1589) Gouls 103.

⁶ (1591) Cro. Eliz. 278.

⁷ (1600) Moore 573.

⁸ (1600) 5 Coke. 90 b.

⁹ (1610) 8 Coke. 94 b.

¹⁰ (1611) 8 Coke. 141 b.

¹¹ (1611) Cro. Jac. 246.

¹² (1613) 1 M. & S. 425.

¹³ (1806) 2 Sch. & Lef. 50.

¹⁴ (1844) 1 J. & L. 178 (259);
6 Ir. Eq R. 569.

¹⁵ (1848) 2 H. L. C. 257.

¹⁶ (1850) 3 H. L. C. 49.

¹⁷ (1864) 1 Wallace 627 (634).

¹⁸ (1855) 18 Howard 497.



1914

Narendra Chandra
v.
Jogendra Narain.

and *Grignon v. Astor*¹. The reason for the rule is uniformly stated to be that the stranger purchaser cannot be expected to go behind the judgment, to enquire into irregularities in the suit, and that it is sufficient for him to know that the Court had jurisdiction and exercised it and that the order on the faith of which he purchased, was made and did authorise the sale. To the same effect is the observation of the Judicial Committee in *Rewa Mahton v. Ram Kishen*², and *Zainul Abdin v. Asghar Ali*³. The reason for the rule obviously disappears when the purchaser is himself a party to the suit and has notice, or at least opportunity of knowledge, of all the proceedings therein. The case is clearly one for the application of the maxim, *Cessante Ratione Legis, Cessat Ipsa Lex* (when the reason of any particular law ceases, so does the law itself). The question has been raised in the Courts of the United States and it has been held that a purchaser at a judicial sale, who is a party to the proceeding and in interest, is not a *bona fide* purchaser to the extent that will protect his purchase in case of a reversal of the decree by authority of which it is made : *Buchanan v. Clark*⁴ ; the condition of such a purchaser is unlike that of an absolute stranger to the proceedings who becomes a purchaser under the decree ; such stranger is protected, but the sale fails, on reversal of the decree, as to the purchaser who is a party in interest or to the proceedings. There is only one solitary decision, *Gossom Donaldson*⁵, where it was held that the protection afforded to strangers should also be extended to parties to the suit including the plaintiff decree-holder himself. This case stands alone, and the extreme view taken therein has been adversely criticised by text writers. [Kleber on Judicial Sales, sections 201, 202 and 291 ; *Baker v. Baker*⁶]. The decision in *Machride v. Longworth*⁷, is not contrary to this view, as that case turned upon a statute which afforded protection to all execution purchasers, whether strangers or parties to the suit ; in fact, the view taken in *Buchanan v. Clark*⁴, is identical with that taken is

¹ (1844) 2 Howard 219.² (1886) L. R. 13 I. A. 106 ;
1. L. R. 14 Calc. 18.³ (1887) L. R. 15 I. A. 12 ;
10 All. 166.⁴ (1853) 10 Grattan (Va) 164.⁵ (1857) 18 B. Mon. 230 ;
68 Am. Dec. 723.⁶ (1888) 87 Ky. 461.⁷ (1863) 14 Ohio. St. Rep. 349 ;
84 Am. Dec. 383.



*Hubbel v. Broadwell*¹ and *Walpole v. Ink*²; Roper on Judicial Sales, sections 132—134. It is obviously essential, however, that for the reversal of the sale, the person whose property has been sold must be a party to the proceedings: *Withers v. Little*³, *Little v. Superior Court*⁴; *Withers v. Jacks*⁵; Freeman on Execution, Sec. 347. The rule that a stranger purchaser is not affected by the reversal of the decree is based, as the cases show, on grounds of public policy, though it operates harshly upon the person whose property has been sold, and who, it may turn out, in the end, was not liable at all to the plaintiff. We are not prepared to extend the scope of the rule and to apply it for the benefit of parties to the suit in whose case the reason for the rule has no application. Consequently, all the properties which have been purchased by parties to the suit must be resold, if necessary, in execution of the decree now to be made.

We may add that we do not feel pressed by the argument that the decree made by the Subordinate Judge is not in conformity with Rule 4 of Order 34 of the Code. That Rule, no doubt, contemplates a sale of the mortgaged properties, but the decree must be suitably modified in exceptional circumstances, where a sale of the mortgaged properties may be impossible, for instance, where the mortgaged properties have been sold for arrears of revenue, for arrears of rent or as here, in execution of a decree; in such cases, where the property can no longer be reached, either in whole or in part, the Court is competent, in the exercise of its inherent power, to give appropriate directions for the disposal of the fund which represents the property.

The result is that this appeal is allowed, the decree of the District Judge discharged, and the case remanded to him in order that the necessary accounts may be taken and the final decree drawn up. An account will first be taken of the sum due to the plaintiffs upon the mortgage of the 1st June 1898. An account will then be taken of the sums realised by the plaintiffs from the properties purchased by them on the 4th February 1907, and of which, it is said, they have taken possession. Both these

1914

Narendra Chandra
v.
Jogendra Narain.

¹ (1857) 8 Ohio 129.² (1880) 56 Cal. 370.³ (1859) 9 Ohio 143.⁴ (1887) 74 Cal. 219.⁵ (1889) 79 Cal. 297; 12 Am St. Rep. 143.



1914.

Narendra Chandra
v.
Jogendra Narain

accounts will be taken up to the date of this judgment. The difference between these two sums will be taken and will be reduced by the sum realised by the sale of the mortgaged properties to strangers to the suit. A decree will be made in favour of the plaintiffs for this reduced sum, and the sum decreed will carry interest at six per cent. per annum from this date. The judgment-debtors will be allowed to pay up the money within three months from the date when the decree of the Court below is drawn up and signed. If the amount is not so paid, the mortgaged properties other than those sold to strangers on the 4th February, 1907 will be sold by the Court for the satisfaction of the decretal amount, after the usual order absolute has been made. Each party will pay his own costs of the suit up to the present stage. The costs of the enquiry in the Court below will be in the discretion of that Court. The District Judge will be at liberty to take the accounts himself or to transfer the case for disposal to the Subordinate Judge.

We do not at this stage consider the question of restitution by the defendants purchasers to the mortgagors defendants on account of their possession of the properties they had purchased on the 4th February, 1907. Such question may be determined on application to the Court by which the sale was held : *Beni Madho Sing v. Pran Sing*¹ ; *Raghu Sing v. Shew Prosad*².

Let the records be sent down at once.

Appeal allowed : case remanded.

NOTE.

The main point in this case is the effect of the cancellation of a mortgage decree upon the sale of the mortgaged properties held previous to the cancellation. The rules laid down in this case are :—(1) When the decree-holders themselves are the purchasers. Upon the cancellation of the decree, the purchase by the decree-holders are also cancelled. (2) When the purchasers are not parties to the suit, the purchase is unaffected. (3) When the purchaser is neither a decree-holder nor a stranger but a defendant in the suit, the sale is cancelled. Reasons for the difference in the rights of a purchaser who is a party to the suit and those of one who is a stranger have been given in 20 C. L. J. 473—475. Rule 4 of Order 34 of the Civil Procedure Code contemplates a sale of the mortgaged properties, but the decree must be suitably modified in exceptional circumstances, where a sale of the mortgaged properties may be impossible. An important rule of law about the inherent power

¹ (1911) 15 C. L. J. 187.

² (1912) 16 C. L. J. 135.



of courts in this connection has also to be noted i.e., where the property already sold can no longer be reached, *e.g.*, where it has been sold for arrears of revenue, for arrears of rent or in execution of a decree, the Court is competent, in the exercise of its inherent power, to give appropriate directions for the disposal of the fund which represents the property.

See also the reference to this case in notes to *Khirajmal v. Diam*, L. R. 32 I. A. 23.

A very large number of properties are sold in execution of decrees, but in some cases the decree, after the sale, is set aside by Appellate Courts and the question arises whether the purchaser in the execution sale can retain the property purchased by him, after the setting aside of the decree. For the answer to this question see. 20 C. L. J. 472—475. This case also points out the scope of Order XXXIV r. 4. Civil Procedure Code.

1914

Narendra Chandra
v.
Jogendra Narain.

CHHAYEMANNESSA BIBI

v.

BASIRAR RAHMAN.

[*Reported in I.L.R. 37 Cal. 399 s. c. 11 C.L.J. 285.*]

The judgment of the Court was as follows :—

MOOKERJEE AND TEUNON JJ. We are invited in this appeal to reverse an order of the District Judge by which he has dismissed an application for execution of decree as barred by limitation.

The appellant obtained the decree on the 5th July, 1905. On the 28th June, 1908 she applied for execution. This application was presented by a *mukhtiar*, Gopinath, who signed on the back of the *mukhtiarnama* which was attached to the application. As a matter of fact, the body of the *mukhtiar-nama* did not contain the name of this *mukhtiar*, and the case of the appellant throughout has been that the name was omitted by the mistake of the writer who drew up the power-of-attorney. The Officer of the Court who examined the application overlooked this defect, though he found out that the application was not in order, as the properties sought to be attached had been imperfectly described. On the 2nd July, 1908, the application was returned to the "filing pleader" for amendment within seven days. The application was amended, and refiled on the 6th July following. It was thereupon registered, and notices were directed to be issued on the judgment-debtor under section 248 of the Civil Procedure Code. On the 5th August the judgment-debtor filed his objections. One of these was that the application was barred by limitation; another was that the person who had verified the application was not the duly authorised agent of the decree-holder; but no objection appears to have been expressly taken that the *mukhtiar* had not been duly empowered to file the application. It is not clear how the mistake was first discovered; but on the 10th September the decree-holder filed an application, in which it was stated that by an oversight the name of the *mukhtiar* had been omitted from the power-of-attorney, and along with it a properly executed *mukhtiarnama* in favour of Gopinath was filed. The Court directed his *mukhtiarnama* to be placed on the record.



At the hearing, it was objected that there was no application in accordance with law till the 10th September, 1908, and that it was consequently barred by limitation; but the Subordinate Judge overruled this objection. It may be mentioned that the decree-holder anticipating the objection had, on the 19th September, got Dasarathi Ghosh, who had appeared in the original suit and appeal, to accept the power filed at first by Gopinath; and on the 2nd January, 1909 Dasarathi also signed the application for execution. The Subordinate Judge thought that this was sufficient to validate the proceedings and allowed execution to proceed. On appeal, the District Judge held that the proceedings were illegal; the application for execution which had been originally signed by Gopinath was inoperative, because it was not till the 10th September that Gopinath had written authority to appear on behalf of the decree-holder, and the application treated as made on that day was obviously barred by limitation; on the other hand, the application could not be validated by the subsequent signature of the pleader who had appeared in the original suit. In other words, according to the District Judge the application was inoperative, because it had been signed and presented by a *mukhtiar* who had no written authority at the time, and had not been signed by the pleader who might, at that time, have filed it. In this view the District Judge allowed the appeal and dismissed the application for execution.

The decree-holder has now appealed to this Court, and on her behalf it has been contended that in the events which had happened, the application ought to have been treated as within time; that although the original *mukhtiarnama* did not contain the name of the *mukhtiar* who accepted it, it was open to the Court to allow the *mukhtiarnama* to be subsequently amended; and that the application of the 10th September, 1908 might, in substance, be treated as an application for such amendment. It has further been argued that as objection was not taken on this ground by the judgment-debtor, he must be taken to have waived it, and that in any event the Court had inherent power so to amend the proceedings as to do justice between the parties. These positions have been controverted on behalf of the respondent, and it has been boardly argued that the parties ought to be made strictly to adhere to the rules of procedure on the

1910

Chhayemannessat
Bibi
v.
Basirar Rahman.



1910
 Ohhayemannessa
 Bibi
 v.
 Basrar Rahman.

subject. The question raised for our decision is one of some novelty, and is not altogether free from difficulty. But after careful consideration of the arguments addressed to us on both sides, we are of opinion that the contention of the appellant should prevail.

Section 36 of the Civil Procedure Code of 1882 provides that any application or act required or authorised by law to be made or done by a party to a suit, may be made or done by his recognised agent or by a pleader duly appointed to act on his behalf. Section 39 provides that the appointment of a pleader shall be in writing, and such appointment shall be filed in Court. Section 37, which deals with recognised agents, specifies the classes of persons by whom appearances, applications, and acts may be made or done on behalf of the parties. The second clause of the section deals with certificated *mukhtiar*s, who, when holding special powers-of-attorney authorising them to do on behalf of their principals such acts as may legally be done by *mukhtiar*s, may appear or act. Under the rules of this Court, a certificated *mukhtiar* is authorised to file an application for execution (Rules and Circular Orders, Chapter XI, Article 34). Section 37 of the Code, however, does not define a power-of-attorney, nor is any definition given elsewhere in the Civil Procedure Code, or in the General Clauses Act.

A question might, perhaps, therefore arise as to whether a power-of-attorney, for purposes of section 37, must always be in writing; in other words, whether authority to act, when conferred upon a certificated *mukhtiar*, must be by a written instrument.

In England, it appears to have been ruled that written authority is not absolutely necessary and that parole authority is sufficient: *Lord v. Kellet*.¹ The case of *Wright v. Castle*² shows that an attorney who acts without a written authority may find himself in trouble if his client denies that he had authority to institute the proceedings; and Lord Eldon observed that a solicitor must furnish himself with an authority in writing (Street on Equity Procedure, Volume I, sections 570 and 641; Gibson on Suits in Chancery section 1174; Annual Practice, 1910, Volume II, page 436). In this country, it is undoubtedly

¹ (1835) 2 Myl. & K. 1.

² (1817) 3 Mer. 12; 36 E. R. 12.



the practice for *mukhtiar*s to file *mukhtiar*namas, and as it has not been argued that a power-of-attorney under section 37 may be by parole, we shall assume that it must be in writing; that is, that a power-of-attorney is an instrument by which the authority of an attorney in fact is set forth. This view receives some support from the case of *Walker v. Remmett*¹. If, therefore, written authority is essential, the question arises whether an application made by an attorney, whose name has by mistake been omitted from the power, can be validated by a subsequent amendment. In our opinion there is no reasonable doubt that the Court has inherent power to allow such amendment to be made, and that the amended power takes effect from the date when it was originally filed.

In the first place, it is clear upon the authorities that a Court has inherent power, in any particular case, to adopt such procedure as may be necessary to enable it to do that justice for the administration of which alone it exists: *Panchanan Singha Roy v. Dwarka Nath Roy*², *Hukun Chand Boid v. Kamalanand Singh*³. As Mr. Justice Mahmood observed in *Narsingh Das v. Mangal Dubey*⁴, 'the Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law.' This is of course subject to the qualification that, in the exercise of its inherent power, the Court must be careful to see that its decision is based on sound general principles, and is not in conflict with them or the intentions of the Legislature. A similar view was emphasised by Lord Penzance in *Kendall v. Hamilton*⁵, where he observed that procedure is the machinery of the law after all, the channel and means whereby law is administered and justice reached; it strangely departs from its proper office, when, in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern where it ought to subserve. Now there can be no room for controversy that the Code of Civil Procedure allows

1910

Chhayemannessa
Bibi
v.
Basirar Rahman.

¹ (1846) 2 C. B. 850; 69 R. R. 625. ² (1905) 1 L. R. 33 Cal. 927.

³ (1905) 3 C. L. J. 29.

⁴ (1882) 1 L. R. 5 All. 163.

⁵ (1879) 4 App. Cas. 504, 525.



1910

Chhayemannessa
Bibi

v.

Basirar Rahman.

amendments to be made in judicial proceedings under various circumstances. No comprehensive formula can be framed to define precisely the power of a Court to allow such amendments to be made, but this much may be laid down as the cardinal rule, that the allowance of amendments must, in every stage of the case, rest with the discretion of the Court, and that discretion must depend largely on the special circumstances of each case. If a limit to amendments may be laid down, it is this: that they must not be allowed to prejudice the substantial rights of the party in favour of whose opponent the amendment is allowed, but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court: *Hardin v. Boyd*¹, *Codington v. Maff*.²

In a case like the present, where there is no doubt as to the fact that the *Mukhtiar* who filed the application for execution had in fact authority from the decree-holder, and that his name was omitted by mistake from the power-of-attorney, it is, in our opinion, reasonable to hold that the Court may in its discretion allow the power to be amended upon proper application by the decree-holder for the insertion of the name of the attorney.

The view we take is supported by the case of *Pinde v. Norton*³ where a mistake of a name in a warrant-of-attorney to suffer a common recovery was allowed to be amended: see also Comyn's Digest, 5th Edition, Volume I, page 746, tit. Attorney, and Bacon's Abridgment, 7th Edition, Volume I, page 404, tit. Attorney. The same view is borne out, to some extent, by the decisions in *Dhanpa Singh v. Lilanand Singh*⁴, *Autoo Misree v. Bidhoomookhee Dabee*⁵ and *Lakshmi Das v. Govind Ram*⁶, where want of authority in the person who presented an application for execution was treated as a mere irregularity which could be waived, a view not inconsistent with that taken in *Murari Lal v. Umrao Singh*⁷.

In the second place, it is reasonably clear that if such amendment is allowed, it takes effect from the date when the power-of-attorney was originally filed. It is not practicable to lay down any rule of universal application on the subject of

¹ (1884) 113 U. S. 756.² (1862) 14 N. J. Eq. 430;

82 Am. Dec. 258.

³ (1554) Dyer. 105a.⁴ (1869) 2 B. L. R. App. 18.⁵ (1878) I. L. R. 4 Cal. 605.⁶ (1882) Punj. Record 105.⁷ (1901) I. L. R. 23 All. 499.



the retro-active effect of amendments. There are cases, however, in which amendments have been allowed with retro-active effect; for instance, when a plaint has been filed upon insufficient court fees, upon payment of deficit court fees, the suit must be taken to have been instituted on the day when the plaint was originally filed: *Skinner v. Orde* ¹. In other cases of amendments also, for instance, amendments of applications for execution of decrees, the amended application has been treated, for purposes of limitation, as if it had been presented in its amended form on the original date: *Fuzloor Ruhman v. Altaf Hossein* ² *Macgregor v. Tarini Churn Sircar* ³ *Jivat Dube v. Kali Charan Ran* ⁴ *Shama Prosad Ghose v. Taki Mullik* ⁵, which were not referred to in *Raghunatha Thaha Chariar v. Venkatesa Tawker* ⁶, where a different view was taken. In fact, when an amendment has been properly made, and the cause of action is not altered, the amended pleading may properly be regarded as a continuation of the original pleading and takes effect as of the date when the latter was filed. On these principles, we must hold that it was competent to the Court of first instance to allow the omission in the original power-of-attorney to be supplied, and that as soon as the defect was removed, the proceeding was validated from its inception.

The result, therefore, is that this appeal must be allowed, the order of the District Judge set aside, and that of the Court of first instance restored with costs throughout.

Appeal allowed.

¹ (1879) I. L. R. 2 All. 241;

L. R. 6 I. A. 126.

² (1886) I. L. R. 14 Calc. 124.

³ (1896) I. L. R. 20 All. 478.

⁴ (1884) I. L. R. 10 Calc. 541.

⁵ (1901) 5 C. W. N. 816.

⁶ (1902) I. L. R. 26 Mad. 101.

NOTE.

The Code of Civil Procedure allows amendments to be made in judicial proceedings under various circumstances. The cardinal rule about such amendments is that the allowance of amendments must, in every stage of the case, rest with the discretion of the Court, and that discretion must depend largely on the special circumstances of each case. "A Judge can always reconsider his decision until the order has been drawn up, but he cannot do so after the drawing up or filing of the order." *In re St. Nazaire Coy* (1879) 12 Ch. D 88,91. "Quite apart from §151 Civil Pro-Code, any court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made." *Debi Bakhsh V. Habib Shah* (1913)

1910

Chhayemannessa
Bibi

v.
Basirar Rahman.



1910

Chhayemannessa
Bibi

v.

Basirar Rahman.

40 I.A. 151, 155. s. c. 17C. W. N. 829=18C. L. J. 19. The principle followed in this case is that the court has inherent power, in any particular case, to make such order as may be necessary to enable it to do that justice for the administration of which alone it exists. Besides the general rule contained in §151 of the Code of Civil Procedure, the principles of restitution, of power to amend, of power to enlarge time, have been recognised in the Civil Pro-Code. In British India the courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. This is of course subject to the qualification that in the exercise of its inherent power, the court must be careful to see that its decision is based on sound general principle, as is not in conflict with them or the intention of the Legislature. See *Nistarini Debi V. Chandidasi Debi* (1910) 12 C. L. J. 423, 426. The British Indian Codes are not exhaustive. See notes on *Hukumchand V. Kamalanand* (1905) 33 C. 927. Codification in British India. Tagore Lecture for 1912 Lec IV. p. 147. The next point noted in this case is that when an amendment or change is made by the court in the exercise of its inherent power, the amendment takes effect from the date when the document altered was originally put in. For the meaning of "accidental slip or omission" used in §152 Civil Pro-Code see *In re Gist* (1904) 1 Ch. 398, 403, 413; *Ainsworth V. Wilding* (1896) 1 Ch. 673, 676, 677; *Charles Bright & Co. V. Sellar* (1904) 1 K. B. 19.

UPENDRANATH KALAMURI

v.

KUSUMKUMARI DAS.

[*Reported in I. L. R., 42 Cal., 440 s. c. 19C. W. N. 520*
=20 C. L. J. 485.]

The judgments of the Court were as follows :—

MOOKERJEE J. This appeal is directed against an order by which the Subordinate Judge has confirmed an order of the Court of first instance for execution of a money decree. On the 7th April 1904, the respondent obtained a decree for money against one Gobardhan Kalamuri described as the shebait of goddesses Lakshmi and Bhagabati. Before the decree could be executed in full, the judgment-debtor died. On the 28th July, 1909, the decree-holder applied for execution of the decree by the sale of a one-fourth share of 260 bighas of land within certain boundaries. She stated in her petition that the judgment-debtor was dead, that he had left five nephews (sons of different sisters) as also three paternal uncles, that one or more of these persons had succeeded as shebait of the endowment, but that as plaintiff had not been able to ascertain who was the shebait, she prayed that execution might proceed after service of notice on all these persons under rule 22 of Order XXI of the Civil Procedure Code, 1908. Notices were issued accordingly. The nephews of the original judgment-debtor took no notice of the proceedings, but on the 19th August 1909, two of the uncles filed a petition of objection, in which they urged, amongst other things, that the properties sought to be attached had not been dedicated to the goddesses named but were private secular properties of the objectors, though under a deed, dated the 29th June 1877, a part of the income of these properties had been directed by the then proprietor to be applied for religious purposes. It transpired at the same time that the other uncle of the judgment-debtor, who had not entered appearance, had died on the 10th August; the decree-holder thereupon applied that the two objectors who had appeared might be treated as the representatives of the deceased; this was granted. The Court then proceeded to investigate the objection and, on the 13th September 1909, came to the conclusion that the properties sought



1914

Upendra Nath
Kalamuri
v.
Kusum Kumari
Dasi.

to be attached had been dedicated to the goddesses named; in this view, the Court overruled the objection and directed execution to proceed. The objectors then appealed to the Subordinate Judge. When the appeal came on for hearing, a preliminary objection was taken by the decree-holder respondent that the appeal was incompetent, as the order could not be deemed to have been made under section 47 of the Code. The Subordinate Judge expressed himself in favour of this view, but as he felt doubtful whether the appeal was really incompetent, he considered the case on the merits and ultimately confirmed the order of the original Court. The objectors have appealed to this Court and have contended, *first*, that the appeal to the Subordinate Judge was competent, and, *secondly*, that he has misunderstood the legal effect of the deed of the 29th June 1877.

To determine whether the appeal to the Subordinate Judge was competent, it is necessary to ascertain whether the order of the primary Court falls within the scope of section 47. The answer to the question, whether an order in execution proceedings is within the scope of this section, depends upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree, and if the decision has been given between the parties to the suit or their representatives in interest, the order of the Court falls within the scope of this section, is a decree within the meaning of section 2, and as such is appealable under section 96: *Raghubar v. Jadu Nandan*¹, *Joytara v. Prankrishna*². It cannot be disputed that the order of the original Court decided a question relating to the execution of the decree held by the respondent, namely, whether the decree could be executed by attachment and sale of the property specified in the application of the decree-holder. But the point remains, whether this question arose between the plaintiff decree-holder on the one hand, and the defendant judgment-debtor or his representatives on the other hand. It is plain that if and in so far as there was an endowment, the objectors were the legal representatives of the judgment-debtor, within the meaning of that expression as defined in section 2, clause (ii) of the Code; the

¹ (1911) 15 C. L. J. 89.² (1910) 13 C. L. J. 257.

original defendant had been sued in a representative character as the shebait of the two goddesses named; the objectors had succeeded to the office of shebait and the estate held by the deceased as shebait had devolved on his successors in office. This view is in accord with the elementary rule that when a decree has been passed in a suit against a shebait as representing an idol, it is binding on the succeeding shebait, provided it has been passed without any fraud or collusion: *Prosunnokumari v. Golab Chand*¹. *Tulsidas v. Bejoy*², *Manikka v. Balagopalakrishna*³. But when a decree has been passed against a person in his capacity as shebait, execution can be taken out only against the properties of the endowment in his hands; for as Subramania Ayyar, J., observed in *Venkatasami v. Kuppeyee*⁴, the private property of an individual cannot be taken in execution of a decree made against him in his capacity as manager or trustee of an endowment, just as the property of the endowment cannot be taken in execution when the decree against him is in respect of his personal debt. The two capacities are fundamentally distinct, and the individual constitutes two distinct juristic persons from the two different points of view. In the present case, the decree-holder seeks to proceed against the property on the assumption that the appellants hold it as part of the endowment of the two idols named. The objectors, on the other hand, assert in their personal capacity, that this is their private property and is not available to the decree-holder for satisfaction of her decree. That decree is essentially against the debutter estate, though, as pointed out by their Lordships of the Judicial Committee in *Jagadindranath Ray v. Hemantakumari Debi*⁵, the suit was bound to be brought against the shebait as such, because it is only in an ideal sense that an idol, though regarded as a juristic person, can hold property. The true position, consequently, is that the question raised by the objectors calls for decision between the decree-holder who is a party to the suit and two persons who are not, for this purpose, representatives of the original defendant, as they

1914

Upendra Nath
Kalamuri

v.
Kusum Kumari
Dasi.

¹ (1875) L.R. 2 I.A. 145:

14 B.L.R. 450: 23 W.R. 253.

² (1901) 6 C.W.N. 178.

³ (1906) I.L.R. 29 Mad. 543.

⁴ (1904) 14 Mad. L.J. 377

⁵ (1904) 32 Calc. 129: L.R. 31 I.A. 203.



1914

Upendra Nath
Kalamuri
v.
Kusum Kumari
Dasi.

raise the objection, not in their capacity as shebait, but in their private individual capacity. This view is supported by the decision of the Full Bench in *Kartick Chandra v. Ashutosh Dhara*¹. There it was ruled that when X, in execution of a decree for money against Y personally, attaches and proceeds to sell properties of which Y alleges that he is in possession, not in his own right but as shebait of a deity to whom the properties have been dedicated, the case does not fall within section 244 of the Code of 1882 or section 47 of the Code of 1908. The principle recognised by the Full Bench is that there is a fundamental distinction between a right acquired or liability incurred by Y in a personal capacity, and a claim advanced or defence interposed by the same individual in his capacity as shebait of a deity. If this distinction is borne in mind, the inference follows that when X, in execution of a decree for money against Y as shebait of a deity, attaches and proceeds to sell properties of which Y or his successor in office alleges that he is in possession, not as shebait of the deity, but in his own right, the case does not fall within the scope of section 47. Y, in his character as shebait, the only character in which he is a party to the suit, cannot rightly be deemed the same person in his character as a private individual. We may add that the decision of the Full Bench in *Punchann v. Rabia Bibi*², on which reliance was placed by the appellants, is not directly in point and does not assist their contention. That case is an authority only for the proposition that when X, in execution of a decree for money against Y, seeks to proceed against Z as the legal representative of Y, who is liable only to the extent of the assets of Y in his hands, and a question arises, whether a particular property does or does not constitute such assets, it must be determined by the execution Court under section 47 of the Code. Nor is the contention of the appellant supported by the cases of *Moharaj Kumar Bindeswari v. Thakur Lakpat Nath*³, and *Umeshananda v. Mohendra Prosad*⁴. The former case shows that where a party has obtained an order in his favour on the footing that the Court was competent to deal with the matter and make the order under section 47, he cannot, when the validity of the

¹ (1911) I.L.R. 39 Calc., 298.² (1910) 15 C. W. N. 725.³ (1890) I.L.R. 17 Calc. 711.⁴ (1911) 14 C. L. J. 337.

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order is challenged by way of appeal, impugn the appeal as incompetent on the ground that the order could not have been made under section 47. The latter case is an authority for the proposition that where a decree has been obtained against a person (who had been really removed from the office of shebait) on the erroneous assumption that he is still the shebait, and upon application made to execute such decree against his successor in office, an objection is raised that there is no valid decree capable of execution against the properties of the endowment, the question falls within section 47, because a question was raised, who was the representative of the judgment-debtor, which could be determined only under clause (3) of that section. Reference was finally made to the decisions of their Lordships of the Judicial Committee in *Chowdry Wahed Ali v. Jumae*¹ and *Abidunnissa v. Amirunnissa*², neither of which lays down any principle contrary to the view I propose to take. The first case affirms, what must now be regarded as incontestable, namely, where a decree against a person in a representative capacity has been properly passed and proceedings have been taken thereunder to obtain execution against him in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree. The second case shows that section 11 of Act XXIII of 1861 (which with important modifications now stands as section 47 of the Code of 1908) was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree.

It follows that the order of the original Court was not made under section 47 and was not a decree liable to be challenged by way of appeal. It must be taken to have been made under rule 60 of Order XXI, although it may be difficult to make the language of that rule fit in precisely with a case in which the defendant has been sued in a representative capacity and prefers a claim in his personal capacity. The rule, however, recognises a broad distinction between the representative character and the personal character of the same individual. In this view, the appeal to the Subordinate Judge was incompetent, and no

1914

Upendra Nath
Kalamuriv.
Kusum Kumari
Dasi.¹ (1872) 11 B. L. R. 149.² (1876) I. L. R. 2 Calc. 327 L. R. 4 I.A. 66.

B.S. 2558



1914

Upendra Nath
Kalamuriv.
Kusumi Kumari
Dasi.

opinion need be expressed on the question, whether the objection is well founded on the merits. The appeal is consequently dismissed with costs.

BEACHCROFT J. In this case a very real difficulty is raised by the decisions in the cases of *Punchanun v. Rabia Bibi*¹ and *Kartick Chandra Ghose v. Asutosh Dhara*². Both are decisions of a Full Bench. In the first of these two cases, it was decided that an objection by the representative of the judgment-debtor in execution to the effect that the property attached was his own and not held by him as such representative was cognisable only under section 244 of Act XIV of 1882, (section 47 of the present Code). *Prima facie* that decision would seem to cover the present case. The appellant has been brought on the record as the representative of the original judgment-debtor and his claim is that the property is his own, and that he does not hold it as shebait. In the second of the above cases, it was decided that when the objector alleges that he is in possession, not in his own right but as shebait of a deity to whom the property has been dedicated, the order passed is one under section 278 of the old Code (now O. XXI, r. 58). The ground on which the decision proceeded was that while the objector was a party to the suit in one capacity, the claim was advanced by him in another, and consequently the question did not arise between the parties to the suit in which the decree was passed and therefore was not one to be determined under section 244.

Now, if this be taken to be the underlying principle to be applied in cases of this nature, it might also have been applied in the case of *Punchanun v. Rabia Bibi*¹, for while the objector claimed the property as her own in her personal right, she was a party to the suit, only because she was the widow of the original judgment-debtor and therefore liable to the extent of the assets which had come into her hands.

So far then, as the principle was recognised in one case and ignored in the other, the two cases would seem to be in conflict. But the learned judges who decided the latter case distinguished it from the earlier one on the ground that it dealt with the converse question. If that be a real ground of distinction, it might be said that the present case being also the converse to the case

¹ (1890) I. L. R. 17 Calc. 711.² (1911) I. L. R. 39 Calc. 298.



of *Kartick Chandra Ghose v. Ashutosh Dhara*¹, is not concluded by that decision, but should follow that in *Punchannun v. Rabia Bibi*². The distinction, however, fails when it is attempted to apply it to the facts of the case before us, for here we again have one person in a dual capacity, a state of things which was the foundation of the decision in *Kartick Chandra v. Ashutosh*¹.

Can then the two cases be reconciled? One possible view occurs to me; it is this. If the claim of the objector is really in his own interests as representative of the judgment-debtor, the case will come under section 244, if the claim is adverse to his interest as representative, it will not. If this be a correct test, it will satisfy the conditions in the case of *Punchannun v. Rabia Bibi*², for the widow's claim in her personal right was in her interests as representative of the judgment-debtor. It will satisfy the conditions in *Kartick Chandra v. Ashutosh*,¹ for the objector's claim as shebait was adverse to his interests as representative of the judgment-debtor. Applied to the present case, it provides a feature distinguishing it from the case of *Punchannun v. Rabia Bibi*² and a solution in accord with the principle underlying the case of *Kartick Chandra v. Ashutosh*.¹ I, therefore, agree in dismissing the appeal.

Appeal dismissed.

¹ (1911) I. L. R. 39 Calc. 298.

² (1890) I. L. R. 17 Calc. 711.

NOTE.

It is erroneous to suppose that the troubles and difficulties of a plaintiff are over as soon as he gets a decree. It is true in most cases that the plaintiff's troubles and difficulties begin after the passing of the decree. It is necessary for him to find out how he should proceed to get the relief asked for in his plaint and granted by the decree. For this purpose he will have to ask for the help of the court and the question then is whether he should file a separate suit or apply in the course of the execution proceedings for the particular relief he asks for. Now Sec. 47 of the present Civil Procedure Code (Sec. 244, Act XIV of 1882) shows in what cases the decree holder may get the particular relief he asks for without instituting a fresh suit. It says "all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit." Under this rule the question to be decided must be between parties to the suit in which the decree was passed, or their representatives. (For the history and scope of this section see Woodroffe on *Civil Procedure in British India*, notes on Sec.

1914

Upendra Nath
Kalamuri
v.
Kusum Kumari
Dasi.



1914

Upendra Nath
Kalamuri
v.
Kusum Kumari
Dasi.

47, pp. 229-232.) The main object of this section is to prevent multiplicity of suits, and the tendency both of the British Indian Legislature and Courts has been to enlarge as much as possible the scope of the proceedings before Courts charged with the execution of the decree. The present rule on the subjects as contained in Sec. 47 Civil Procedure Code is more comprehensive than that contained in Sec. 244 of the Old Code of 1882. Subsection (2) and explanation have been introduced for the first time in Sec. 47 and subsection 3 has been redrafted and it is now compulsory on the Court to determine questions arising as to representation of parties. The words "parties to the suit" are not now limited to judgment-creditors and judgment-debtors. The word "representative" refers to all persons by or against whom the decree may be executed. The term "legal representative" has been defined in the Civil Procedure Code for the first time in Sec. 2 (11). (See Woodroffe on *Civil Procedure in British India*, notes on Sec. 47, pp. 249-250.) See also *Rashid-un-Nisa, v. Muhamad Ismail Khan* (1909) 36 I.A. 168 s.c., 10 C.L.J. 318; *Kartikchandra v. Asutosh Dhara* (1911), 39 C. 298; *Punchanan v. Rabia Bibi*, (1890) 17 C. 711, *Fukirchandra v. Giribala*, (1915), 22 C.L.J., 304, should be read carefully and distinguished.

The answer to the question whether an order in execution proceedings is within the scope of this section, depends upon its nature and contents. (See p. 444 of the Report). The next important point to be noted in this case is that when a decree has been passed in a suit against a *shebait* as representing an idol, it is binding on the succeeding *shebait*, provided it has been passed without any fraud or collusion. But when a decree has been passed against a person in his capacity as *shebait*, execution can be taken out only against the properties of the endowment in his hands; for the private property of an individual cannot be taken in execution of a decree made against him in his capacity as manager or trustee of an endowment, just as the property of the endowment cannot be taken in execution when the decree against him is in respect of his personal debt. For the distinction between these two capacities read pp. 445-446 of the Report.



AJO KOER AND ANOTHER

v.

GORAK NATH.

[*Reported in 20 C. L. J. 481, s. c. 19 C. W. N. 517.*]

The judgments of the Court were as follows :—

June 4.

MOOKERJEE J.—This is an appeal by the judgment-debtors against an order of the District Judge, by which he has dismissed an appeal against an order of the Subordinate Judge in the matter of execution of a decree for money. The decree has been obtained by the respondent against one Kripal Narayan Tewari. Before the decree could be executed in full, the judgment-debtor died. The decree-holder thereupon took out execution against his widow Ajo Koer as his legal representative. The widow took objection to the attachment of four of the properties against which the decree-holder sought execution as the assets of the original judgment-debtor in her hands. She contended that the properties in question were her own properties and did not form part of the estate of her husband. The Subordinate Judge investigated the matter and overruled the objection on the ground that the disputed properties belonged not to the lady but to her husband. The widow then appealed to the District Judge. A preliminary objection was taken that the appeal was incompetent, because the order was not under section 47 of the Code but under Rule 61 of Order XXI. The District Judge gave effect to this contention and dismissed the appeal without determination of the merits of the question in controversy between the parties. On the present appeal, the order of the District Judge has been assailed as based upon an erroneous view of the scope of section 47. It is plain that the order under appeal cannot be supported.

In the case of *Punchanun v. Rabia Bibi*¹, it was unanimously held by a Full Bench of this Court that an objection, taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree, to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative,

¹ (1890) I. L. R. 17 Calc. 711 F. B.



1914

Ajo Koer
v.
Gorak Nath.

is a matter cognizable only under section 244 of the Code of Civil Procedure, 1882. This decision is binding upon this Court, and is in no way affected by the decision of the subsequent Full Bench in *Kartick Chandra Ghose v. Ashutosh Dhara*¹. That case affirms the proposition that when X, in execution of a decree for money against Y personally, attaches properties of which Y alleges that he is in possession, not in his own right but as shebait of a deity to whom the property has been dedicated and who is not a party to the suit, the question raised falls, not within section 244 but within section 278 read with section 280 of the Code of 1882. This principle does not contravene the rule laid down in *Punchanan v. Rabia Bibi*² and has no application to the case before us. When, as here, X, in execution of a decree for money against Y, proceeds against Z as the legal representative of Y in respect of property in the possession of Z, and Z contends that the property belongs to him and never formed part of the estate of Y, the question arises whether such property is assets in the hands of Z and is liable to be seized in execution of the decree against Y. Such question is plainly a question relating to execution of the decree obtained by X against Y and arises between the plaintiff decree-holder X on the one hand and the representative Z of the defendant judgment-debtor Y on the other hand. The question consequently must, under section 47, be determined by the Court executing the decree and not by a separate suit. The position is entirely different when X in execution of a decree for money against Y personally, attaches property in the possession of Y, which Y alleges he holds not in his own right but as shebait of a deity who is not a party to the suit. The question raised is, no doubt, a question relating to the execution of the decree obtained by X against Y, but does it arise between the parties to the suit? Clearly not. The decree has been made in a suit between X on the one hand and Y in his personal capacity, on the other hand. The question in execution arises between X on the one hand and Y in his capacity as trustee of an endowment, on the other hand. Y has a twofold capacity; in one character he is a party to the suit; in the other, he is a stranger

¹ (1911) I. L. R. 39 Calc. 298 F. B. ² (1890) I. L. R. 17 Calc. 711.



to the suit. The position is precisely what it would have been if Z had been the shebait and had claimed the property as such when attached by X in execution of his decree against Y. It is further plain from an examination of the terms of Order 21, Rule 60 that while it applies to the class of cases of which *Kartick v. Ashutosh* may be taken as the type, it cannot by any stretch of language be made to cover the class of cases of which *Punchannun v. Rabia Bibi* ² is the leading example. In the former class of cases, the judgment-debtor objects that he is in possession as trustee and not on his own account within the meaning of Order 21, Rule 60; in the latter class of cases, the representative of the judgment-debtor objects that the property in his hands is not assets available to the decree-holder. The objections in the two classes of cases are obviously of fundamentally different kinds. Reference may in this connection be made to the elaborate judgment of Wilson J. in *Rajrup Singh v. Ramgolam Roy* ³, which was approved by the Full Bench in *Punchannun v. Rabia Bibi* ². The view taken by the Full Bench, has now been adopted by all the Indian High Courts. *Seth Chand Mal v. Durga Dei* ⁴; *Kali Charan v. Fewat Dube* ⁵; *Murigeya v. Hoyat Saheb* ⁶; *Gokulsing v. Kisānsingh* ⁷; *Vengapayyan v. Karimpanakal* ⁸. In this view, the objection, raised by the widow of the original judgment-debtor, who has been brought on the record as his legal representative and who contends that four of the properties sought to be made liable in execution of the decree against her husband do not constitute assets available to the decree-holder, must be determined under section 47 of the Code.

The result is that this appeal is allowed, the order of the District Judge set aside and the case remanded to him in order that the appeal may be heard on the merits. The appellants are entitled to their costs both here and in the Court of appeal below. We assess the hearing fee in this Court at five gold mohurs.

1914.

Ajo Koer
v.
Gorak Nath.

¹ (1911) I. L. R. 39 Cal. 298.² (1905) I. L. R. 28 All. 51.³ (1890) I. L. R. 17 Cal. 711.⁴ (1898) I. L. R. 23 Bom. 237 (242).⁵ (1888) I. L. R. 16 Cal. 1.⁶ (1910) I. L. R. 34 Bom. 546.⁷ (1889) I. L. R. 12 All. 313 F. B.⁸ (1902) I. L. R. 26 Mad. 501.



1914
Ajo Kper
v.
Gorak Nath

BEACHROFT J.—I agree to the proposed order on the ground that the matter is concluded by the decision of the Full Bench in the case of *Punchanan v. Rabia Bibi* ¹.

Appeal allowed. Case remanded.

¹ (1890) I. L. R. 17 Calc. 711.

NOTE.

In attaching his judgment-debtor's properties in the execution of a decree for money, the judgment-creditor should be careful in ascertaining that the properties to be attached really belong to the debtor. It may be that those properties may be in the possession of the debtor but are not his or they may be in his possession as a *shebait* or a trustee and they are not his own. If such properties are attached the alleged owner may apply for the withdrawal of the attachment or file a suit to establish his claim under certain circumstances. The objector under certain circumstances may apply under s. 47 (s. 244 of Act XIV of 1882) or proceed under Ord. XXI, r. 58. In this case the question was raised whether the order made was an order under s. 47 or r. 61 of Ord. XXI. See pp. 482-483. The next question is whether the objector is a stranger to the suit or a representative of the judgment-debtor. In this connection the case of *Punchanan v. Rabia Bibi* (1890 I.L.R. 17 C. 711 F. B.) was followed and the case of *Kartik v. Ashutosh* (1911) 39 C. 298 F. B. was distinguished. Another question raised and discussed is whether there was an appeal from the order of the lower appellate Court to the High Court. This case is substantially the same as *Fakir Chand v. Giribala* (1915) 22 C. L. J. 304.



KARTICK CHANDRA GHOSE AND OTHERS

v.

ASHUTOSH DHARA.

[*Reported in I. L. R. 39 Cal. 298 s.c. 14 C. L. J. 425*
=16 C. W. N. 26.]

The case first came on for hearing before Mr. Justice Mookerjee and Mr. Justice Vincent who referred it to a Full Bench on the 25th August, 1909, by the following

September 5.

ORDER OF REFERENCE.

On the 20th May, 1907, one Ashutosh Dhara, respondent in this appeal, obtained in the Court of the Subordinate Judge of Hughly, a decree for money against Kartickchandra Ghose and his two brothers, now appellants before this Court. On the 4th June, 1907, Ashutosh applied for execution of his decree. As certain properties had been attached before judgment, the Court directed the issue of sale proclamation and fixed the 13th August for sale. On the 7th August, the judgment-debtors presented a petition of objection under section 244 of the Civil Procedure Code of 1882, in which they urged that the properties attached and intended to be sold were in their possession, not on their own account or as their own properties, but in trust for four idols in whose favour they had been dedicated by their ancestors under a deed of endowment executed on the 31st January, 1883. The Subordinate Judge held that the question raised fell within the scope of section 378 and not section 244, and under the proviso to the former section, declined to make the investigation on the ground that the claim had been designedly and unnecessarily delayed. The sale then took place in due course on the 13th August, and the properties were purchased by the decree-holder. The judgment-debtors then appealed to the District Judge on the ground that the objection preferred by them fell within the scope of section 244, and that it should not have been summarily rejected without investigation. The District Judge, however, held that the judgment-debtors were the representatives, not of a party to the suit but of a deity who was not a party to the litigation. In this view, he held that the claim must be taken to have been preferred under section 278,

1911.

Kartick Chandra
Ghose

v.

Ashutosh Dhara.

and so affirmed the order of the Court of first instance. The present appeal is directed against the order of the District Judge. On behalf of the appellants reliance has been placed upon the cases of *Beg Raj v. Sreemuty Kundali* ¹ and *Jogendranath v. Gobinda Chandra* ² in support of the view that the objection raised falls within the scope of section 244, and reference has also been made to some observations in the case of *Punchannun v. Rabia Bibi* ³. On behalf of the respondent, reliance has been placed upon the cases of *Roop Lal v. Bekani Meah* ⁴, *Bhajahari v. Ram Lal* ⁵, *Ram Krishna v. Mohunt Padma Charan* ⁶ and *Amar Chand v. Nani Gopal* ⁷ in support of the view that the question raised is covered by section 278, and our attention has also been drawn to the case of *Ramanathan v. Levcai* ⁸ where a similar view was taken by a Full Bench of the Madras High Court. There is a clear conflict of judicial opinion upon this subject, and under the Rules of Court, we are bound to refer the matter for decision to a full Bench. The question which we refer for decision may be formulated as follows :

If A in execution of a decree for money against B personally attaches and proceeds to sell property, of which B alleges that he is in possession, not in his own right but as shebait of a deity to whom the properties have been dedicated, does the question raised fall within the scope of section 244 or 278 of the Code of 1882 ?

As the question arises in an appeal from an appellate order, the whole case must be referred for final decision by the Full Bench.

The JUDGMENT OF THE COURT was as follows :

The question referred for decision to the Full Bench has been formulated in the following terms :

If A in execution of a decree for money against B personally attaches and proceeds to sell properties of which B alleges that he is in possession, not in his own right, but as shebait of a deity to whom the properties have been dedicated, does the

¹ (1902) 8 C. W. N. 353.

² (1908) 12 C. W. N. 310.

³ (1890) I. L. R. 17 Calc. 711.

⁴ (1888) I. L. R. 15 Calc. 437.

⁵ (1901) 6 C. W. N. 63.

⁶ (1902) 6 C. W. N. 663.

⁷ (1907) 12 C. W. N. 308.

⁸ (1898) I. L. R. 23 Mad. 195.



question raised fall within the scope of section 244 or 278 of the Code of 1882 ?

In order that a question may be determined under section 244, it must arise between the parties to the suit in which the decree was passed. The question sought to be raised is not of this description, because, while B is a party to the suit in his personal capacity, the claim is advanced by him in his capacity of shebait of a deity who is not a party to the suit.

In the opinion of the Full Bench, therefore, the question raised does not fall within the scope of section 244. On the other hand, it falls within the scope of section 278 read with section 280.

It has been argued, however, that this view is contrary to two decisions which are binding upon the Full Bench, namely *Kuriyali v. Mayan*¹ and *Punchanun v. Rabia Bibi*². The first decision, no doubt, involves by implication the view that the question raised falls within the scope of section 244, but is not binding upon this Court; it was approved by the Judicial Committee in *Prosunno Kumar v. Kali Das*³, upon an entirely different point, namely, that section 244 does not cease to be applicable to proceedings in execution merely because the execution purchaser is a stranger to the suit. The decision in *Punchanun v. Rabia Bibi*², is by a Full Bench of this Court, and is binding till overruled by Special Bench. It does not, however, decide the question now in controversy, but merely deals with the converse question.

The result is that the appeal to the District Judge as also the appeal to this Court must be deemed incompetent. The appeal is, therefore, dismissed with costs of the hearing before the Division Bench and the Full Bench.

Appeal dismissed.

¹ (1883) I. L. R. 7 Mad. 255.

² (1890) I. L. R. 17 Calc. 711.

³ (1902) I. L. R. 19 Calc. 683.

NOTE.

Note—See notes on *Upendra Nath v. Kusumkumari* I. L. R. 42 Cal. 440 s. c. 19 C. W. N. 520=20 C. L. J. 485.

1911.

Kartick Chandra
Ghose.

v.
Ashutosh Dhara.



PUNCHANUN BUNDOPADHYA

v.

RABIA BIBI AND OTHERS.

[*Reported in I.L.R. 17 Cal. 711. (F. B.)*]

This was a reference to a Full Bench made by a Division Bench (PRINSEP and HILL, JJ.) on the 12th July 1889 : the referring order was as follows :—

“The predecessor of the plaintiff obtained a decree on the 28th of December 1881, on a mortgage bond, against the husband of defendant No. 1. In execution a portion only of the mortgage debt was satisfied by sale of the mortgaged properties. During the proceedings in execution the mortgage-debtor died, and in the course of further proceedings taken in execution of that decree after his death against his widow as his representative, certain property was attached as forming portion of his estate. The widow objected on the ground that this property had been sold to her on the 1st January 1883, that is, after the decree and before the attachment. Her objection was allowed, and the property was released from attachment. The decree-holder now sues to have it declared that the sale was fraudulent and collusive ; that the property was that of the judgment-debtor, and therefore liable in satisfaction of the decree against him.

“An objection was taken and allowed by the Court of first instance that the suit was barred by section 244 of the Code of Civil Procedure, inasmuch as the matter could be properly tried only in execution of the decree as between the decree-holder and the defendant No. 2, the representative of the original debtor, as it related to the execution, discharge, or satisfaction of the decree. That is the only point that has as yet been heard by us on appeal. The decisions of this Court and the other High Courts have not been uniform in respect of this very important point, on which the case law may be said to commence with the judgment of their Lordships of the Privy Council in the case of *Chowdhry Wahed Ali v. Jumae* ¹. These cases are set out in the judgment of the Lower Court, but we would add to them two more recent cases—*Raj Rup Singh v. Ram Golam Roy* ²

¹ 11 B. L. R., 149.² I. L. R., 16 Cal., 1.



and *Gour Moni Dabee v. Jagut Chandra Audhikari* ¹, decided by another Division Bench on the 21st May last. We think it most desirable that the expression of an opinion by a Full Bench on this point should be obtained so as to ensure the uniformity of procedure in the future, and we may add that we have hesitation in following in this case the rule laid down in *Raj Rup Singh v. Ram Golam Roy* ². We therefore refer, for the consideration of a Full Bench, the following point:—Whether an objection taken by one who has become the representative of the original judgment-debtor in the course of execution of a decree, to the effect that the property attached in satisfaction thereof is his own private property, and not held by him as such representative, is a matter cognizable only under section 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under sections 280 and 281 as provided by section 283.”

The opinions of the Court (PETHERAM, CJ., PRINSEP, PIGOT, O’KINEALY, and GHOSE, JJ.) were as follows:—

PETHERAM, CJ.—My answer to the question put to the Full Bench is, that an objection taken by one who has become the representative of the original judgment-debtor in the course of the execution of a decree, to the effect that the property attached in satisfaction thereof is his own private property and not held by him as such representative, is a matter cognizable only under section 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under sections 280 and 281 as provided by section 283.

Section 234 provides that when a judgment-debtor dies before the decree has been fully executed, the decree-holder may apply to execute it against the legal representative of the deceased, and the section goes on to limit the liability of the legal representative to assets of the deceased which have come to his hands, and gives the Court power to compel him to produce accounts, so that under section 234 a question may arise between the decree-holder and the legal representative of the deceased as

1890

Punchannun Bundo-
padhyav.
Rabia Bibi.¹ I. L. R., 17 Cal., 57.² I. L. R., 16 Cal., 1.



1890

Punchannun Bundo-
padhya
v.
Rabia Bibi.

to whether the legal representative has or had assets of the deceased which are liable to answer the decree-holder's claim.

In the present case, although the question takes the form of an enquiry whether certain property, which is admittedly in the hands of the person against whom an order has been made under section 234, came to her as the heiress of the deceased or by some other title, it is in fact the very question contemplated by section 234, whether the legal representative has or has had assets of the deceased, and so is liable to satisfy the claim of the decree-holder.

Section 244 provides that all questions between the parties to the suit, or their representatives relating to the execution, discharge or satisfaction of the decree, shall be determined by order of the Court executing the decree: and not by separate suit: and I think that this question under section 234, whether the legal representative has or has had assets, must be a question between him and the decree-holder relating to the execution of the decree, and so comes within the operation of section 244. Mr. Justice Wilson, in the case of *Raj Rup Singh v. Ram Golam Roy*¹, has taken the same view of the section, and after an elaborate examination of the authorities comes to the conclusion that they support that view, and it is not necessary for me to add more than that I entirely agree with his judgment.

Our attention has been called to a reported case of later date than the judgment of Mr. Justice Wilson, that of *Gour Moni Dabee v. Jugutchandra Adhikari*². In that case the learned Judges, Tottenham and Banerjee, JJ., say that question raised under the provisions of section 234 must be decided under section 244. The other questions which were discussed in their judgment do not arise in this reference.

PIGOT J.—I agree that upon the authorities the matter was one cognizable under section 244, and that therefore a separate suit will not lie.

O'KINEALY J.—It appears from the record of this case that the predecessors of the plaintiff obtained a mortgage decree on the 28th December 1881 against the husband of defendant No. 1, and that during the proceedings in execution the mortgagor died and the defendant Rabia Bibi was placed on the record as his

¹ I. L. R. 16 Calc. 1.

² I. L. R., 17 Calc., 57.



representative. Subsequently certain property was attached as forming a portion of the mortgagors estate, and on the widow objecting, her objection was allowed and the property released from attachment. This order is to be found at page 46 of the Paper-book, and runs as follows :—

The oral and documentary evidence offered by the claimant proves that she is in possession of the properties claimed from before the date of attachment, under a *kobala* executed by her late husband in part satisfaction of her *den-mohur*.

"The decree-holder has failed to rebut this evidence. I accordingly allow the claim. The property claimed shall be released from attachment. Vakeel's fee, Rs. 20, and other costs of the claimant shall be borne by the decree-holder.

In this state of facts the learned Judges of the Division Bench who heard this case, have referred to us for consideration the following question:—

"Whether an objection taken by one who has become the representative of the original judgment-debtor in the course of execution of a decree, to the effect that the property attached in satisfaction thereof is his own private property, and not held by him as such representative, a matter cognizable only under section 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under sections 280 and 281, as provided by section 283.

Section 244 (c) states that a Court executing a decree shall determine, among other questions.—

"Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree."

This section, with the exception of the words "or their representatives, is the same as section 11 of Act XXIII of 1861, and the meaning to be attached to it has been the subject of discussion on several occasions before their Lordships of the Privy Council.

In the case of *Wahed Ali v. Jumae*¹, the facts were as follows: A suit for possession of immovable property and mense profits was brought against certain defendants among whom

1890

Punchannun
Bundopadhya
v.
Rabia Bibi.

¹ 2 B. L. R. (F. B.) 73.



1890
Punchanun
Bandopadhyaya
v.
Rabia Bibi.

were Wahed Ali and his daughter Mussummat Jumae. Wahed Ali died, and an application was made in January 1856 to have his son, Mullick Inayet Hossein, his daughter, Mussummat Jumae and others, made defendants as being his heirs and representatives. Ultimately in the High Court the claim against Mussummat Jumae personally was dismissed, but possession with mesne profits was decreed against her in her representative capacity.

In execution of the decree Mussummat Jumae's private property was sold notwithstanding her objections and Wahed Ali became the purchaser. This sale was confirmed on the 15th March 1864, and after the confirmation Mussummat Jumae brought a suit to cancel the sale held in the execution proceeding and to obtain her property. The case came before a Full Bench of this Court, and the majority of the Judges held that Mussummat Jumae was only a party in her representative capacity, and that the Legislature only intended that parties in their own right, and not parties in their representative character, should come within the purview of section 11 of Act XXIII of 1861. They therefore decided that a regular suit would lie. This case was appealed to the Privy Council, and their Lordships held that where a decree was passed against a person in his representative capacity, he was party to the suit in respect of any question that might arise between him and the other parties relating to the execution of the decree within the meaning of section 11 of Act XXIII of 1861. So far therefore it has been settled that a party sued in his representative capacity and against whom a decree has been obtained is, in regard to any claim that he may make in his own right to property attached, a party within the meaning of section 11 of Act XXIII of 1861.

The next case in which an interpretation was put under section 11 of Act XXIII of 1861, was that of *Abdunnessa v. Amirunnessa*,¹ in the Privy Council. That was a case in which, after the death of the decree-holder, a contest arose between two parties Wajid Ali and another as to which of them was to be treated as his legal representative. At last it was held that Wajid Ali was the representative. A suit was then instituted to declare that Wajid Ali was not the legal representative,

¹ L. R., 4 I. A., 66



and for an injunction to prohibit execution of the decree in the previous suit. So far as the present case is concerned, it is only necessary to state what their Lordships of the Privy Council said in regard to section 11 of Act XXIII of 1861.

They say,—

“Their Lordships quite accede to the view of the learned Counsel for the appellant, that this section was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an appeal from decisions in such trials; but the question narrows itself to this, whether the present case comes under these words: ‘any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree.’ There must be two conditions to give the Court jurisdiction. The question must be between parties to the suit, and must relate to the execution of the decree”¹.

They then further add, by way of pointing out the rules which should guide a Judge in deciding whether a person was party or not, that Wajid Ali “was in no proper sense of the word a party to the suit. No rights of Wajid Ali were determined or considered in the suit. He was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree; but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit,” under section 11, Act XXIII of 1861.

Since then, the words, “or their representatives,” have been added to the section by the Legislature, and following the rules laid down by their Lordships of the Privy Council, it appears to me that section 244 embraces all cases where there is an existing decree, in which the contest is between parties whose names were on the record when the judgment was given or the decree made, or their representatives, and where some right has been determined or considered between the parties or their representatives, such right relating to the execution, discharge or satisfaction of the decree. In the present case all these conditions are fulfilled.

¹ L. R., 4 I. A., 74.

1890

Panchann
Bundopadhy
v.
Rabia Bibi.



1890

Punchnun
Bundopadhyaya
v.
Rabia Bibi.

I therefore think that, unless we were to unduly narrow the scope of a section, which should be liberally constructed in order to prevent litigation, the question arising in this case was one under section 244 of the Code of Civil Procedure.

The next point is, whether the claim can be considered to be a claim coming within the provisions of sections 278 to 283 of the Civil Procedure Code. These sections correspond to section 246 and the following sections of Act VIII of 1859, the scope of which was twice considered in Full Bench decisions of this Court. In *Wahed Ali v. Jumae*¹, it was decided that sections 246 and 247 did not apply to a case in which the party on the record, in a representative capacity, claimed the release of property attached in execution of the decree on the ground that it belonged to himself. In the course of his judgment, Sir Barnes Peacock states :—

“ If the plaintiff had made an application under that section ” (meaning section 246 of Act VIII of 1859), “ her claim must have been disallowed, for the property was in her possession, on her own account, and not on account of any third person.”

In section 281 of the present Code, it is stated—

“ If the Court is satisfied that the property was, at the time it was attached, in possession of the judgment-debtor as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.”

There is no difference between the present law and Act VIII of 1859, so far as the present reference is concerned ; I think, adopting the reasoning in the case of *Wahed Ali v. Jumae*, that sections 278 to 283 have no application to such a claim ; but further, I am of opinion that sections 278 to 283 have no reference to any claim raised in execution of a decree between parties on the record or their representatives. Section 278 states :—

“ If any claim be preferred to, or any objection be made to the attachment of any property attached in execution of a decree, on the ground that such property is not liable to such

¹ 2 B., L. R. (F. B.), 73.



attachment, the Court shall proceed to investigate the claim or objection, with the like power as regards the examination of the claimant or objector, *and in all other respects as if he was a party to the suit.*"

In other words, it suggests that a party making the claim is not a party to the suit; for if the meaning of the law is that parties to the suit may, under certain conditions, make a claim to the property attached, the latter portion of this section would have no meaning. No doubt it has been laid down that under section 280, if the result of the investigation be that the Court is satisfied that the property was not, when attached, in the possession of the judgment-debtor, or of some person in trust for him, the property must be released; and it has been argued that this shows that a trustee in possession, who has unsuccessfully put forward in an execution proceeding, the title of a person other than the judgment-debtor, as the beneficial owner, may subsequently bring a regular suit to establish his right to interest in the property. I think on consideration, that this argument is not sound. The section itself does not state who are to be the parties to the execution proceeding, but points out what should guide a Judge in deciding the contest; and that this is the true construction is shown by the concluding portion of section 278. A similar interpretation was placed upon section 246, Act VIII of 1859, in the case of *Nga Tha Yah v. Burn*¹. In that case the Court decided that it is for the claimant, and not for the execution creditor, to begin, and he must show his own title to the property and not the title of any third party with whom he has no connection. Sir Barnes Peacock, in referring to section 246 of Act VIII of 1859, indirectly shows that, in his opinion, the claim must have been a claim of a party not on the record. He says:—"In the early part of the section, the Court is directed to investigate the claim with the like powers, as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in section 220. It is said that the words are remarkable; they are not that the claim is to be investigated as if the claimant were a party to the suit, but 'as if the claimant had been originally a defendant in the suit,' that is, the suit in

1890

Punchanun
Bundopadhya
v.
Rabia Bibi.

¹ 2 B. L. R. (F. B.). 91; 11 W. R. (F. B.), 1.



1890

Punchanun
Bundopadhya
v.
Rabia Bibi.

which the execution issued. But I take it that the meaning really is 'that the Court is to have the same powers of investigation as if the claimant was a party to a *suit* which would give them power to summon the claimant and to dispose of the case against him, if he should refuse to attend' ¹.

Again, dealing with the nature of the claim which must be preferred, he states—"If the Nazir were to seize goods, believing them to be in the actual possession of a defendant, the claimant would have to prove that the Nazir had seized the goods of the claimant as the goods of the judgment-debtor. In an ordinary case, if the Sheriff wrongly seizes goods, the real owner brings an action against the Sheriff for seizing goods belonging to him. In such a case the claimant would have to begin and prove that the goods belonged to him. If he could show that the goods were in his actual possession, that would be *prima facie* evidence that they were his property, and not the property of the judgment-debtor. So, if he could prove that the judgment-debtor was his seryant, and had the goods in his possession as his servant, that would prove his case. But no one would contend that the Sheriff would have to begin and prove that the goods belonged to the debtor. Even if they were not the debtor's, the claimant would not have a right to interfere unless he proved that they belonged to him, or were in possession." ².

I think, therefore, that sections 278 to 283 of the present Code do not cover the case of any contest between parties to the suit, or their representatives on the record of the suit in regard to the execution, discharge or satisfaction of a decree, whether the claim set up be a claim on the ground that the property is that of a person on the record or belongs to any third party. It seems to me that the effect of the decision between such parties is, that the right to enforce or oppose execution against the property in dispute is decreed and finally determined under section 244, subject to the result of such appeal as is given to them by law.

PRINSEP, J.—I am of the same opinion.

GHOSH, J.—I am also of opinion that an objection taken by a person, who has become the representative of a judgment-debtor in the course of the execution of a decree, to the effect that the

¹ 2 B. L. R. (F. B.) 100.

² 2 B. L. R. (F. B.) 98.



property attached in satisfaction thereof is his own property, is a matter cognizable only under section 244 of the Civil Procedure Code, and not the subject-matter of a separate suit. And I agree with Mr. Justice O'Kinealy in thinking that the matter does not fall within sections 278 to 283, and that the effect of a decision upon the objection of the representative is that the question of the liability or otherwise of the property to satisfy the decree is determined under section 244, subject to the result of such appeal as is allowed by law.

NOTE.

See Notes on *Upendra v. Kusumkumari* I. L. R. 42 Cal. 440.

1890

Punchanun
Bundopadhya
v.
Rabia Bibi.

HUKUM CHAND BOID

v.

KAMALANAND SINGH.

[*Reported in I. L. R. 33 Cal. 927 s. c. 3 C. L. J. 67.*]

The following judgments were delivered by the Court :

WOODROFFE J. The appellant bought on the 14th May 1904 a *putni* taluk at a sale for arrears of rent. The respondents held a *darputni* in certain *manzas* in the *putni* mehal. The appellant got possession. The respondents then brought a suit to set aside the sale. A decree was passed in their favour on the 24th August 1905 ordering that they should be put back into possession. On the 14th September the decree was signed and on the same day the respondents with haste applied for and obtained (notwithstanding an application by the respondents for stay of delivery in order to enable him to move this Court) an order for delivery of possession of the villages comprised in their *durputni*. On the 18th September an appeal, which is now pending, was filed in this Court. On the same date the appellant obtained a rule, No. 3423, under section 545 of the Code calling upon the respondents to show cause why delivery of possession should not be stayed pending the hearing of the appeal. The rule further ordered that in the meantime and pending the hearing of this rule, all further proceedings should be stayed. Before however the rule reached the Lower Court, but after it had been granted, possession was obtained by the respondents. As section 545 does not apply after execution has been carried out, the appellant, in consequence of the actual delivery of possession, obtained another rule, No. 3443, (which together with the former rule is now before us) to show cause why security should not be taken from the respondents for the due performance of any decree, which may be made by this Court in the appeal. The second application purported to be made under section 546.

It is not necessary for me to discuss the merits of the case as the learned pleader for the respondents has consented to the form of the order, which we pass, provided that we are of opinion that we have power to make it. He has however contended that we have not. He submits that section 546 does not apply, that



there is no other section which does, and that our powers are limited to what the Code expressly says may be done. I think the argument is sound so far as it disputes the applicability of section 546. That section has reference to the case where an order has been made for execution and the execution is pending or about to be given effect to. It does not apply where the order for execution has been actually carried out and where, as in the present case, the property in suit has actually been delivered under the order made; for it cannot be said when a decree has been executed that the respondents are going to enforce any order for execution. They have already done so. In point of fact there is in such case, no order for execution at all. It was accordingly held under section 36, Act XXIII of 1861, which corresponds to section 546 that after property, the subject of litigation, has been given over in execution of a decree to the plaintiff it is not within the scope of this section to exact security for the restitution of such property in the event of a successful appeal, *Mānsukhram Turshotam v. Javarevohu*.¹ This is also shewn to be the case by the words of section 546 "which may be taken in execution," that is, in future, not "which may be or may have been taken in execution" and by the nature of the provision itself, the intention being to enable the Court to fix terms upon the party taking out execution, the penalty for non-compliance with such terms being that the order in such case will not be allowed to be carried out. Section 546 therefore does not apply. But then it is argued that, if that be so, the appellant is out of Court as there is no express provision of the Code which allows of an application of this nature. In other words it is contended that the Court has no powers in matters of procedure other than those expressly conferred by the Code. This argument assumes that the Code was intended to be and is exhaustive. It is one with which in previous judgments I have had to deal, it having been then as now (and as appears not uncommonly to be the case) thought that it is sufficient (without anything more) to defeat an application or to reverse an order, that no precise section of the Code can be cited as an authority for it. For my part I am always slow to believe that the Court's powers are unequal to its desire to order that

1905

Hukum Chand Bold
v.
Kamalanand Singh.

¹ (1870) 7 Bom., H. C. A. C. J. 122.



1905

Makum Chand Boid
v.
Kamalanand Singh.

which it believes to be just. As was said in *Durga Dihal Das v. Anoraji*¹ the Code is not exhaustive, there are cases which are not provided for in it, and to adopt the observations made in that case I decline to believe that those are cases, where this Court must fold its hands and allow injustice to be done. With the exception of a passing observation of Strachey C. J. in *Habib Bakhsh v. Baldeo Prasad*², I am not aware of any authority, which has laid down that the Code is exhaustive. The essence of a Code no doubt is to be exhaustive on the matters in respect of which it declares the law. On any point specifically dealt with by it the law must be ascertained by interpretation of the language used by the Legislature. In respect of such matters the Court cannot disregard or go outside the letter of the enactment according to its true construction. The Code therefore binds all Courts so far as it goes. It does not however affect previously existing powers, unless it takes them away. Further the law cannot (as pointed out by Sir Barnes Peacock C. J.) make express provisions against all inconveniences so that their dispositions shall express all the cases that may possibly happen, and it is therefore the duty of a Judge to apply them not only to what appears to be regulated by their express provisions, but to all the cases to which a just application of them may be made and which appear to be comprehended, either within the express sense of the law or within the consequences that may be gathered from it. *Hurro Chunder Roy Chowdhry v. Shoorodhonce Debia*³. The Code does not as I have already had occasion to hold, *Punchanon Singh v. Kunuklota Barmoni*⁴ affect the power and duty of the Court, in cases where no specific rule exists, to act according to equity justice and good conscience, though in the exercise of such power in must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature. There are also matters, and I do not now deal with them, in which a question may arise whether the right to make an application or the exercise of a power is derived entirely from express legislation, as in the case of the right to prefer and entertain an appeal or to award costs, it being a matter of dispute in the latter case whether a question of costs is one of procedure or one affecting

¹ (1894) I. L. R. 17 All. 29, 31.² (1868) 9 W. R. 402, 406.³ (1901) I. L. R. 23 All. 167, 173.⁴ (1905) 3 C. L. J. 29.



vested rights. The Court has, therefore, in many cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to act *ex debito justitiæ* and to do that real and substantial justice for the administration, for which it alone exists. It has thus been held that, although the Code contains no express provision on the matters hereinafter mentioned, the Court has an inherent power *ex debito justitiæ* to consolidate ; postpone pending the decision of a selected action ; and to advance the hearing of suits ; to stay on the ground of convenience cross suits ; to ascertain whether the proper parties are before it ; to enquire whether a plaintiff is entitled to sue as an adult ; to entertain the application of a third person to be made a party ; to add (section 32 not being exhaustive) a party ; to allow a defence in *forma pauperis* ; to decide one question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorise a Judge to do what in this matter was justice and for the advantage of the parties ; to remand a suit in a case to which neither section 562 nor section 566 applies ; to stay the drawing up of the Court's own orders or to suspend their operation, if the necessities of justice so require ; to stay, apart from the question whether the case falls within section 545, the carrying out of a preliminary order pending appeal ; to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stay ; to apply the principles of *res judicata* to cases not falling within sections 13 and 14 of the Code and so forth. These instances (and there are others) are sufficient to show, firstly that the Code is not exhaustive and, secondly, that in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice between the parties, which is warranted under the circumstances and which the necessities of the case require.

I hold therefore that the mere fact that there may be no express provision in the Code, which meets the present case, is not in itself a bar to the grant of the application. It still however remains to be seen whether, apart from this, the case is one in which we should interfere.

It was doubtless held in the decision already referred to, *Mansukhram Purshotam v. Javarevohu*¹, that the present

¹ (1870) 7 Bom. H. C. A. C. J. 122.

1905

Hukum Chand Boid
v.
Kamalanand Singh.



1905

Hukum Chand Boid
v.
Kamalanand Singh.

application was neither within the scope of the corresponding section in the Act of 1861 nor in the power of the High Court. That decision appears however to have been based on the case of *Joynarain Patur v. Russeck Mohun Bannerjee*¹ which however was dissented from in *Sooruj Monce Dayee v. Sudanund Mohapattur*², *Juggo Lall Oopadhya v. Jankee Beebee*³ which are based on the decision of the Privy Council in *Mussumat Jarintool Butool v. Mussumat Hoseinee Begum*⁴ an apparent authority for the power of the Court to order security, although possession of the property in dispute has been already obtained without the giving of security. It was so regarded more recently by the Madras High Court: *Narayanan Chetti v. Arunachellam Chetti*⁵. It is true that these cases refer to appeals to the Privy Council and the provisions contained in section 608 of the Regulation, which previously took its place. It is also the fact that clause (d) of section 608 gives the Court very general powers, but the principle of the earlier cases under the Regulation would appear to be as equally applicable to appeals to this Court as to the Privy Council. Further a decree of reversal necessarily carries with it the right the restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed. This is the principle embodied in section 583. There is, however, apart from the appointment of a receiver, no provision whereby before such a decree a decree-holder, who has properly obtained possession in execution, can be deprived of it. But it seems to me that successful appellant being entitled to restitution, the Appellate Court has, as ancillary to its duty, to restore the party to what he has lost, which has been taken from him by his opponent under the judgment reversed—a power to pass such orders as may ensure that it shall be in a position to fully carry out that duty, which will fall to it upon the successful determination of the appeal. It would also be open to the Appellate Court to appoint a receiver and on an application to that effect to abstain from appointing a receiver upon the opposite party furnishing the necessary security.

¹ (1866) 8 W. R. 144.² (1872) 17 W. R. 521.³ (1869) 12 W. R. 296.⁴ (1865) 10 Moo. I.A. 196.⁵ (1895) I. L. R. 19 Mad. 140, 142.



I am of opinion, therefore, that we, who have *seisin* of the appeal, have also an inherent power over the subject of litigation, the nature of which is indicated and implied by section 583 and can in the exercise of that power and notwithstanding that the decree has been executed, call upon the respondent to furnish security for the due performance of any decree, which may be made on such appeal. It was said in *Joynarain Pattur v. Russeek Mohun Banerjee* ¹ that such an order could not be enforced, but as stated that decision has been dissented from and I see no reason why this Court certainly and perhaps also Mofussil Courts could not enforce such order by way of proceedings taken for contempt.

There is however another ground upon which this application is sustainable. The original rule, which was granted under section 545, directed that all further proceedings should be stayed. Notwithstanding such order and by reason of its not being communicated in time to the Lower Court execution proceeded and possession was given. Before the Lower Court gave possession this Court had ordered that it should not be done. It may however be contented on the authority of *Bessesswari Chowdhurany v. Hurro Sundar Mojumdar* ², that the order of this Court only takes effect, when communicated to the Lower Court and that proceedings in execution taken in ignorance of the order of stay are not void. It is to be observed that in that case the questions as to the validity of the sale in execution arose in a suit between the alleged judgment-debtor and a third party purchaser, whereas in the present case the matter is between the parties themselves. But apart from this I must respectfully dissent from the decision. An order for stay is made on the day that it is pronounced and not on that on which it is drawn up (*In re The Risca Coal and Iron Company ; ex-party Hockey* ³) or communicated. No doubt in the case of a prohibitory order by way of injunction, which also operates from the date of the order being made in the sense stated and which is directed to a party and not to a Court, communication is necessary, for the Court will not punish a man for doing what he did not know it was forbidden to him to do. No such

1905

Hukum Chand Boid
v.
Kamalanand Singh.

¹ (1866) 8 W. R. 144.² (1892) 10. W. N. 226.³ (1861) 31 L. J. Ch. 429.



1905

Hukum Chand Boid
v.
Kamalanand Singh.

considerations here arise. And I can see no reason why the operation of an order of this Court is to be made contingent say upon the due performance of the duties of the Post-office. When the Court has said that execution of a decree is not to take place, from that moment the Court, to which application has been made for execution, has no authority to execute it and delivery of possession under the authority of an order, which was not then in force, but had been suspended upon a stay granted by a Superior Court, is in my opinion invalid. In this case therefore the delivery of possession being in contravention of the order staying proceedings cannot stand and it would have been necessary to direct the possession, which has been so obtained, to be restored, were it not that the appellant is content that the possession should remain with the respondent upon his furnishing the security asked for. We accordingly discharge Rule 3423 without costs and make Rule 3443 absolute on the following terms:—

The respondent will pay into the Collectorate before the 17th November, the day fixed for the sale, the whole amount in respect of which the sale is advertised to take place and will deposit in the Collectorate within one month from the 17th November, Government securities of the nominal value of Rs. 8,000 to meet any sums, which may become due for *putni* rent up to the end of Choit next. The first mentioned amount is to be applied towards stay of sale, unless the appellant procures a stay of the sale by paying up all arrears and also paying a sum equal to the amount, which will accrue due up to the end of Choit next, in which case the sums paid by the respondent will be kept in deposit to the credit of the suit. Costs of this rule will be costs in the appeal. In the event of the respondent not carrying out this order, the appellant will have liberty further to apply.

MOOKERJEE J. The facts, which have given rise to the litigation, out of which the proceedings now before this Court arise, so far as it is necessary to state them for the purposes of these rules, lie in a narrow compass. Within the zemindari of Bhagobati Chowdhurani, there is a *putni taluk* Mirzapore Khoparia, held by Chatterput Singh. The *putni* extends over many villages, some of which are held in *darputni* right by



Kamalanand Singh and his brother, who are opposite parties to these rules. On the 14th May, 1904, the *putni* was sold under the provisions of Regulation VIII of 1819, at the instance of the zemindar and was purchased by Hukum Chand Boid, the petitioner in these rules. The purchaser took possession of all the villages comprised in the *putni* claiming that the property had passed to him free of the rights of the *darputnidars*. The *darputnidar* then instituted a suit for declaration that the sale was invalid, because it had been held in contravention of the provisions of the Regulation and for recovery of possession. This suit was decided in favour of the plaintiff on the 24th August 1905, but the decree was not actually signed till the 14th September. Immediately upon the signing of the decree the successful plaintiffs made an application for execution and for delivery of possession. The judgment-debtor prayed that under the second paragraph of section 545 of the Civil Procedure Code, execution might be stayed for one week to enable him to prefer an appeal to this Court and to obtain an order for stay of execution during the pendency of the appeal under the first paragraph of that section. This application of the judgment-debtor appears to have been summarily rejected, and a writ of delivery of possession was ordered to issue. Before, however, possession could be actually delivered to the judgment-creditor, the judgment-debtor lodged an appeal in this Court on the 18th September 1905, against the decree of the District Judge. On the same day upon an application presented by the appellant this Court issued a rule calling on the decree-holders opposite party to show cause why delivery of possession of the *darputni* tenures to them should not be stayed pending the hearing of the appeal, upon such terms as to security as the Court might direct. The Court further ordered upon this petition that in the meantime and pending the hearing of the rule, all further proceedings shall be stayed. This rule is No. 3423 of 1905. Before, however, the order of this Court could be communicated to the Court below, on the 25th September, possession was delivered to the decree-holders. The appellant, as soon as he came to know of this, applied to this Court on the 27th September 1905 and obtained a rule calling upon the decree-holders respondents to show cause why security should not be taken from them for the due performance of any decree, which may be made by

1905

Hukum Chand Boid
v.
Kamalanand Singh.



1905

Hukum Chand Boid
v.
Kamalanand Singh.

this Court in the appeals preferred by him. This is rule No. 3443 of 1905. The questions, which arise on these two Rules, were fully argued before us on the 9th November last, and it was contended on behalf of the decree-holders (1) that the first rule ought to be discharged, because the decree has been executed and there is nothing to stay and (2) that the second rule ought also to be discharged, because after the decree has been executed, this Court has no jurisdiction to call upon the decree-holders to furnish security for the due performance of any decree, which may be made in the appeal. In my opinion, the first contention must be upheld, but the second cannot be sustained.

As regards the first rule, it must be discharged because as the decree has been executed there is no longer any execution to stay. This however does not justify the inference that the execution has taken place in accordance with law, and I shall have occasion to examine this aspect of the case later on.

As regards the second rule it is argued by the learned vakil, who appears to show cause on behalf of the decree-holders, that this Court as a Court of Appeal has a jurisdiction to call upon the respondents decree-holders to furnish security for the due performance of the decree, which may ultimately be made in the appeal only during the pendency and before the completion of execution. In support of this proposition, he has placed reliance upon section 546 of the Civil Procedure Code. I am not disposed to accept the somewhat narrow construction, which the learned vakil seeks to place upon section 546 of the Civil Procedure Code. It is at least open to contention, that the words in section 546 of the Civil Procedure Code, namely, "the Appellate Court may for like cause direct the Court, which passed the decree, to take such security" are not controlled by or merely confined to the case in which an order has been made for the execution of a decree and the execution proceedings are still pending. In other words, assuming that the Court, which passed the decree, is competent under the first paragraph of section 546 to require security from the decree-holder only after an order has been made for the execution of the decree and before the execution has been completed, the Appellate Court under the second



paragraph of the section possesses a less restricted power. The words in question are wide and I am not disposed to put too narrow a construction upon them and thus restrict the powers of the Appellate Court. So far as I am aware this clause of section 546 has not been the subject of judicial interpretation, but the construction adopted by the Judicial Committee in the case of *Jariutool Butool v. Hoseinee Begum*¹ distinctly supports the view I take. That case turned upon the construction of Bengal Regulation XVI of 1797, which by section 4 provided that "in cases of appeal to His Majesty in Council the Court of Sudder Dewaney Adawlut may either order the judgment passed by them to be carried into execution, taking sufficient security from the party, in whose favour the same may be passed, for the due performance of such order or decree, as His Majesty, his heirs or successors shall think fit to make on the appeal or to suspend the execution of their judgment during the appeal, taking the like security in the latter case from the party left in possession of the property adjudged against him. The Sudder Court of North-West Provinces interpreted this section as authorising it to demand security from the decree-holder only before the execution of the decree has been completed. Lord Justice Turner in delivering the judgment of the Judicial Committee stated that the question was new and not free from difficulty, and held that it was competent to the Court below to require security to be given or otherwise to provide for the protection and security of the property in question pending the appeal, notwithstanding that execution had been completed. Later on, on the 27th January 1866, a Division Bench of this Court in the case of *Huro Soonduree Debia v. Stevenson*², apparently in ignorance of the decision of the Judicial Committee, held that the High Court has no power to require security from a judgment-creditor, after the judgment appealed against has been carried into execution. The same view was affirmed by a Full Bench of this Court in the case of *Joy Narain Pattur v. Russeek Mohun Bannerjee*³, but the attention of the Court was not invited to the decision of the Judicial Committee. This decision however was brought to the notice of Sir Barnes Peacock C.J. and Mr. Justice

1905

Hukum Chand Boid
v.
Kamalanand Singh.

¹ (1865) 10 Moo. I. A. 196² (1866) 5 W. R. Mis. 13.³ (1866) 8 W. R. 144; B. L. R. Sup. Vol. 744.



1905

Rukum Chand Boid
v.
Kamalanand Singh.

Dwarka Nath Mitter, when on the 10th July 1869 an application was made to them on behalf of the appellant in the case of *Ram Coomar Koondoo v. Macqueen*, which was finally heard by the Judicial Committee in 1872¹, for an order upon the respondent to furnish security after execution had been completed. The learned Judges appear to have dealt with the question, how far the decision of the Full Bench in *Joynarain v. Russeck Mohun Bannerjee*² could be treated as good law in view of the decision of the Judicial Committee in *Jarintool Butool v. Hoseinee Begum*³. Their judgment unfortunately has been lost and no trace of it can be found in the records of Macqueen's case, which I have caused to be searched and carefully examined. An extract from the judgment of Sir Barnes Peacock is however produced by Mr. Justice Loch in his judgment in the case of *Sooruj Monee Dayee v. Sudanund Mohapattur*⁴. The learned Chief Justice appears to have expressed an opinion that the decision of the Judicial Committee is not at variance with the judgment of the Full Bench, which was delivered by himself, but he conceded that according to the Privy Council case the High Court has a discretion to compel the party, who has executed the decree, to give security. With all respect which one must feel for any opinion expressed by Sir Barnes Peacock, I am unable to reconcile the decision of the Full Bench with that of the Judicial Committee, which, I must take it, is binding upon this Court, and this view seems to have been adopted in the cases of *Sooruj Monee Dayee v. Sudanund Mohapattur*⁵, *Juggo Lall Oopadhya v. Jankee Beebee*,⁶ *Khajah Ashanulla v. Karoona Moyi Chowdhry*⁷ and *Narayanan Chetti v. Arunachellam Chetti*.⁸ The contrary view, however, was taken by the Bombay High Court in *Mansukh Ram Purshotam v. Javarevohu*,⁹ where the learned Judges followed the decision of the Full Bench of this Court overlooking the decision of the Judicial Committee. The case, however, is of importance in one way, because it shows that, according to the learned Judges of the Bombay High Court, the same construction, which had been placed upon section 4 of Regulation XVI of

¹ (1872) L. R. I. A. Sup. vol. 40.² (1872) 17 W. R. 521.³ (1866) 8 W. R. 144.⁴ (1879) 4 C. L. R. 125.⁵ (1865) 10 Moo. I. A. 196.⁶ (1895) I. L. R. 19 Mad. 140, 142.⁷ (1869) 12 W. R. 296.⁸ (1870) 7 Bom. H. C., A. C. J. 122.⁹ (1869) 12 W. R. 296.



1797, ought to be placed upon section 36 of Act XXIII of 1861, which so far as the present matter is concerned is substantially identical with section 546 of the present Civil Procedure Code. In the light of the Privy Council decision I must therefore hold that section 546 of the Civil Procedure Code authorises a Court of Appeal to take security from a decree-holder even after execution of the decree under appeal has been completed.

If, however, we assume that a narrow construction is strictly consistent with the terms of section 546 of the Civil Procedure Code, it does not follow by any means that the contention advanced on behalf of the decree-holder ought to be accepted as sound. As has been already pointed out by my learned brother and by myself in our judgments in the case of *Panchanan Singh Roy v. Dwarkanath Roy*,¹ the provisions of the Civil Procedure Code cannot be treated as exhaustive. I entirely repudiate the theory that our powers are rigidly circumscribed by the provisions of the Code, and that we have no power to make a particular order, though it may be absolutely essential in the interest of the justice, unless some section of the Code can be pointed out as a direct authority for it. Such a theory is based on a misconception of the true functions of a Code, as to which reference may usefully be made to a well-known passage from Domat's Civil Law [vol. I, p. 88, Chap. XII, section 17], quoted in my judgment in the case of *Panchanan Singh Roy v. Dwarka Nath Roy*.¹ Such a theory, moreover, is entirely inconsistent with various decisions of the Judicial Committee and of the different High Courts in this country, among which I need only mention those in the cases of *Ram Kirpal v. Rup Kuari*² (which affirms the conclusiveness of interlocutory orders in execution proceedings upon general principles, though section 13 of the Civil Procedure Code is not applicable), *Surendra Nath Banerjee v. The Chief Justice and Judges of the High Court of Bengal*³ (which recognises the power of the High Court to punish summarily by imprisonment contempts of Court by the publication of a libel out of Court, when the Court is not sitting), *Huree Pershad Malee v. Koonjabehary Shaha*⁴ (which recognises the power and duty of a Court to decide jurisdictional questions,

1905

Hukum Chand Boid
v.
Kamalanand Singh.

¹ (1905) 3, C. L. J. 29.

² (1883) 1, L. R. 6 All. 269 ;

L. R. 11 I. A. 37.

³ (1883) 1, L. R. 10 Cal. 109 ;

L. R. 10, I. A. 171.

⁴ (1862) Marshall 99.



1905

Hukum Chand Boid
v.
Kamalanand Singh.

though, as a result of its enquiry, it may turn out that the Court, has not jurisdiction over the suit), *Pasupatinath Bose v. Nandalal Bose*¹ (which recognises the power of an Appellate Court to stay execution proceedings pending an appeal from an order under section 244 of the Civil Procedure Code), *In the goods of Luchmi Narain Bogla*² (which recognises the power of a Court to stay proceedings pursuant to its own order, in view of an intended appeal) and *Balkishen Sahu v. Khugnu*³ (which affirms the existence of power in an Appellate Court to stay proceedings founded on a preliminary order in a partition suit, against which an appeal has been preferred). It may be added that the exercise by Courts, of what are called their "inherent powers" or "incidental powers" is familiar in order systems of law, and such exercise is justified on the ground that it is necessary to make its ordinary exercise of jurisdiction effectual, because, "when jurisdiction has once attached, it continues necessarily and all the powers requisite to give it full and complete effect can be exercised, until the end of the law shall be attained" (See Works on Courts and their Jurisdiction, section 27 and Wells on Jurisdiction of Courts, Chapter XVII). Assuming therefore that there are no express statutory provisions strictly applicable to the case now before us, I would hold that this Court, as the Court of Appeal, has an inherent power to deal with this matter and has upon general principles, which I shall presently explain, ample authority to provide for the protection and security of the property, which is the subject-matter of the litigation. It was pointed out by their Lordships of the Judicial Committee in the case of *Rodger v. The Comptoir D'es Compte de Paris*⁴ that a Court of Appeal when it reverses a judgment of a Subordinate Court, has an inherent jurisdiction to order restitution of everything, which may have been improperly taken, because taken in execution of the decree, which was subsequently reversed. The same principle was affirmed by their Lordships in the case of *Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery*⁵, has been repeatedly adopted by the Courts of this country in various decisions, of which *Dinesh Prasad v. Sankar Chaudhury*⁶

¹ (1901) I. L. R. 28 Calc. 734.² (1901) 5 C. W. N. 781.³ (1904) I. L. R. 31 Calc. 722.⁴ (1871) L. R. 3 P. C. 465.⁵ (1865) 10 Moo. I.A. 203; 3 W. R. P. C. 11.⁶ (1904) 2 C. L. J. 537.



may be taken as the type, and has been recognised by the Legislature in section 583 of the Civil Procedure Code. As observed in the cases of *Hurro Chunder Roy Chowdhry v. Shoorodhonee Debia*¹ and *Dorasami Ayyar v. Annasami Ayyar*², the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the party to the record, who received the benefit of the erroneous judgment, to make restitution to the other party, for what he had lost and it is not merely in the power of the Courts, but it is a duty cast upon them to enforce that obligation. If it is the legal effect of a decree that it is to be executed, it is no less the effect of a decree of reversal that the party, against whom the decree was given, is to have restitution of all that he has been deprived of under it: see Freeman on Judgments, vol. 2, section 482. Now it is manifest that as ancillary to the power, which the Court undoubtedly possesses to order restitution, when the judgment is reversed, it must have the power to take security if necessary from the successful litigant, who takes out execution during the pendency of the appeal, for the due performance of the decree or order of the Appellate Court. Unless such security is taken the exercise of the power of restitution might in many instances prove infructuous. The power to take security is essential to make the power to grant restitution complete and effectual by furnishing the means of enforcing it. Does it then make any substantial difference in principle, whether security is demanded before or after execution has been completed? In my opinion, if regard be had to the ultimate purpose, for which security is demanded from a successful decree-holder, who is anxious to realise or has actually realised the fruits of his decree, I cannot appreciate any substantial distinction between the two cases. An order for security may prove to be quite as essential in the one case as in the other for the effective exercise by the Appellate Court of its unquestioned power to order restitution in the event of reversal of the decree which, while under appeal, has been or is sought to be executed. It has no doubt been suggested, as was indeed suggested in the judgment of the Full Bench in the case of *Joy Narain Pattar v. Russeck Mohun Bannerjee*³, that if this Court makes an order directing a respondent, who had previously

1905

Hukum Chand Boid
v.
Kamalanand Singh.

¹ (1868) 9 W. R. 402.² (1899) I. L. R. 23 Mad. 306.³ (1866) 8 W. R. 144.

1905

Fukum Chand Boid
v.
Kamalanand Singh.

executed the decree to give security and the respondent refuses to carry out the order, it would be difficult to enforce it. It is not necessary for our present purposes to express a decided opinion upon this question, but should the contingency happen I apprehend there will be no difficulty in enforcing the order in view of the principle embodied in section 260 of the Civil Procedure Code and the power of this Court to punish a person guilty of contempt of its authority : see Bailey on Jurisdiction, vol. I, section 295. Reference may also be made in this connection to the case of *Nobin Kali Devi v. Banalata Debi* ¹, which shows that the Court may not be quite as powerless to enforce an order of this description as is imagined.

There is another aspect of the matter now before us to which it is necessary to advert for a moment. Having regard to the proceedings of the Court below, I have no hesitation in stating that the learned District Judge acted with undue precipitancy in ordering execution to proceed, without allowing reasonable opportunity to the petitioner to lodge an appeal in this Court and obtain its orders upon his application for stay of execution. In this connection reference may be made to the observations of Sir Barnes Peacock in the case of *Wise v. Rajkishen Roy* ², where the learned Chief Justice pointed out that in a case of this description there is sufficient cause for staying the hand of the Court below and that it ought to stay its hands, until some order can be obtained from this Court. Apart from this circumstance, however, another important question arises touching the legality of the delivery of possession by the Court below after an order for stay had been made by this Court upon the first application presented by the appellant. As I have already stated this Court on the 18th September last ordered that pending the hearing of the rule then issued, all further proceedings be stayed. The Court below in ignorance of this order delivered possession to the decreeholder. In my opinion that delivery of possession was *ultra vires* and illegal. No doubt the mere issue of a rule by this Court calling upon the opposite party to show cause, why execution should not be stayed, does not operate as a stay of execution, it may also be conceded that a conditional order for stay of execution, for example, an order for stay of execution upon furnishing

¹ (1905) 1. L. R. 32 Calc. 921.

² (1866) 6 W. R. Mis. 84, 91.



security to the satisfaction of the Court below has no effect on the proceedings, till the condition has been fulfilled, but when, as in the case before us, this Court has made an unconditional order for stay of execution, the moment the order is made it becomes operative and suspends the power of the Subordinate Court to carry on further the execution proceeding. I respectfully dissent from the decision of this Court in *Bessesswari Chowdharany v. Hurro Sundar Mozumdar*¹, where the learned Judges appear to have held broadly and without any qualification that an order of an Appellate Court to stay execution of a decree against which an appeal is pending, is in the nature of a prohibitory order and as such would only take effect, when communicated. It is, no doubt, true that if proceedings have to be taken against any person for contempt of the authority of this Court in proceeding with execution after an order for stay has been made, it would be essential to prove that such person has disobeyed or acted in contravention of the order with knowledge that it had been made; but the operation of the order is not postponed till it has been communicated to the Subordinate Court or the party intended to be affected by it. As was pointed out by Baldwin J. in delivering the judgment of the Supreme Court of California in *Buffandean v. Edmondson*², injunction by an Appellate Court for stay of execution operates as a supersedeas to the execution as soon as it is made. The legal authority to proceed with the execution is withdrawn by the act of a competent Court, and there is no more legal justification for the execution after the order for stay than there would be for execution after the proceedings have been quashed. The learned judge further added that no doubt could exist that the order would be effectual without any previous notice to the authority carrying on the execution, because the order for stay has direct effect upon the process itself, although if proceedings are taken to punish the person, who has carried on execution after it had been stayed, it is necessary to show that he had notice of the order, because, it is only after such notice that his act would be in defiance of law and in contempt of the Court. The rule is laid down in similar terms in *Spelling on Injunctions*, vol. I, sections 173—178. The learned author points out that the effect of an injunction upon an execution sale is to stop the proceedings,

1905

Hukum Chand Boidi

v.

Kamalanand Singh.

¹ (1892) 1 C. W. N. 226. ² (1851) 17 California 436; 79 Am. Dec. 139.



1905

Hakum Chand Boid
v.
Kamalanand Singh.

where they are, but the injunction does not operate to kill the execution; the sale is arrested by the injunction, but the seizure is not released and the property remains in legal custody pending the injunction, and, if the injunction is subsequently resolved, the parties are restored to the same position, which they occupied before it was granted, *Duckett v. Dalrymple*¹, *Lamorer v. Cox*.² The same learned author further points out (vol. II, section 1122) that, if it is sought however to subject a party to punishment in contempt proceedings, it is necessary that it be shown that he has had notice of the contents of the restraining order or writ of injunction, at least to the extent of imparting to him the knowledge that the Acts imputed to him were prohibited therein. But that an order takes effect, generally speaking from the time it is made, is amply shown by the cases of *Jones v. Roberts*³, *Aberdeen v. Watkinson*⁴, *Verlander v. Codd*⁵ and *Exp. Hookey*⁶; see also the observations of Lord Esher M. R. in *Holtby v. Hodgson*⁷.

I must therefore hold that the delivery of possession made by the Court below, after this Court had made an unconditional order for stay of execution, was done in excess of its powers and cannot prevent this Court from directing the respondents to furnish security, as it would undoubtedly have power to do, if execution had not been completed. The hands of the Court cannot be tied down and the exercise of its powers cannot be restricted or rendered infructuous, because of an act of the Court below which is manifestly illegal and which it would never have got an opportunity to do, if the execution proceedings had not been rushed through. I have no hesitation in holding that the second rule calling upon the decree-holder to furnish security ought to be made absolute. I have not deemed it necessary to discuss the merits of the application because it has not been seriously contested that under the circumstances of the case and having regard to the imminent danger of the property being wasted or sold away at the instance of the zemindar during the pendency of the appeal preferred to this Court security ought to be taken from the person in possession and the parties have

¹ (1845) 1 Rich. 143.⁴ (1833) 6 Sim. 146.² (1880) 32 La. An. 246.⁵ (1822) 1 Sim. & St. 94.³ (1825) McCle & Yo. 567.⁶ (1862) 4 DeG. F. & J. 456.⁷ (1889) 24 Q. B. D. 102, 107.



very properly agreed as to the terms upon which such security ought to be taken.

The result therefore is that the first rule must be discharged and the second rule made absolute in the terms mentioned in the judgment of my learned brother.

NOTE.

Application for stay of execution of a decree is a very important matter. The mere fact that an appeal has been filed will not stay the execution for which a special order is necessary. If the execution is not stayed, the decree is set aside by the Appellate Court and the decree-holder is not in a position to satisfy the claim of his judgment debtor, the successful appellant will go without any relief. To secure his interest it is sometimes necessary that the decree-holder should be ordered to give security. The main question in this case is whether the High Court has jurisdiction to call upon the respondent decree-holder to furnish security for the due performance of the decree which may ultimately be made in the appeal, after the completion of execution; and if so under what provision of law such an order can be made. Both the learned Judges were of opinion that such an order can be made by the High Court in the exercise of its inherent power (pp. 932, 941) but they did not agree as to the scope of Ord. XLI. Rule 6 (§546 of Act. XIV. of 1882). One of the learned Judges was of opinion that §546 was wide enough to include such a case while the other learned Judge held otherwise. Another important question discussed in this case is what is the essence of a Code. Whether Codes are exhaustive or not (see pp. 931, 940 of the report. *Codification in British India* Tagore Lectures for 1912 pp. 5, 6). Ord. XLI. R. 6 (§546) provides for security for restitution and the principle of the doctrine of restitution has been discussed in p. 942 of the report. The next point to be noted is that the mere issue of a rule by the High Court calling upon the opposite party to show cause, why execution should not be stayed, does not operate as a stay of execution, and it may be conceded that a conditional order for stay of execution, for example, and order for stay of execution upon furnishing security to the satisfaction of the Court below has no effect on the proceedings till the condition has been fulfilled, but when the High Court has made an unconditional order for stay of execution, the moment the order is made it becomes operative and suspends the power of the Subordinate Court to carry on further the execution proceeding. The rule of law enunciated in this case that court has, where the circumstances require it, an inherent power to do justice for the administration of which it alone exists, and where the Legislature has provided no procedure to be followed in cases which must and do arise, the Courts must be taken to have inherent power to decide the question of procedure and, if necessary, to invent a procedure for themselves, has been followed in *Bechu Singh v. Bicharam Singh* (1909) 10 C. L. J. 91 [Transfer of Property Act in so far as it relates to the procedure in mortgage suits, is not a complete code.] *Chhyemannya Bibi v. Basirar* (1910), 11 C. L. J. 285, [court's inherent power to allow

1905

Hukum Chand Boid
v.
Kamalanand Singh.



1905

Hukum Chand Boid
v.
Kamalanand Singh.

amendment of *Muktarnama* upon discovery of mistake] s. c. 16, C. W. N. 1029, Compare, *Moideen Kuppai v. Ponnuswamy* (1914), 26 Ind. Cas. 63 s. c. 16 M. L. J. 430. Section 151 of the present Civil Procedure Code deals with the inherent power of courts in British India. But that section does not formulate a new doctrine. It merely furnishes legislative recognition of a well-established principle which is applicable as much to Courts dealing with matters under Guardians and Wards Act as to ordinary civil courts, *Rashmoni v. Ganada* (1914) 20 C. L. J. 213.

In the exercise of such inherent power the Court must be careful to see that it does not act arbitrarily, but that its decision is based on sound general principles and is not in conflict with them or with the intentions of the legislature. *Abdal Razak v. Bosiruddin*, (1910) 11 C. L. J. 435. A court cannot, in the exercise of its inherent power, assume jurisdiction to grant a review where it has been expressly forbidden by the legislature to entertain such application. *Sasi Bhusan v. Radhanath* (1914) 20 C.L.J. 433.



KHIARAJMAL AND OTHERS.

v.

DAIM AND OTHERS.

[*Reported in L. R. 32 I. A. 23. s. c. I. L. R. 32 C. 296=9*
C. W. N. 201=1 C. L. J. 318=7 Bom. L. R.
1=2 A. L. J. 71.]

The judgment of their Lordships was delivered by

LORD DAVEY. The suit in which this appeal has been brought was one for the redemption of two mortgages dated June 4, 1878, of certain immovable property described as the Pir or Chaudhri Wah (canal) with land measuring 3003 jirebs (equivalent to 1516 acres and 23 gundas) situate in the Registration, District Upper Sindh Frontier. The mortgagors were Mahomedans, but not all members of one family. They are now represented by the respondents. The [mortgagees were two persons named Tekchand and Kodumal, who are represented by the appellants. The suit was originally brought in the Court of the District Judge at Shikarpur, and was transferred to the Court of the Assistant Judge. The present appeal is from the Sadar Court of the Province of Sindh sitting on appeal from the Assistant Judge.

1904
 Nov. 11.

The facts are somewhat complicated, and it will be necessary to state with some precision the tenure of the lands in question and the shares in which the several mortgagors were entitled. The lands were held under five patas, or leases, granted by Government for terms of seven years and renewed from time to time. The current patas at the date of the mortgages in question were numbered 174, 175, 178, 243, and 244. Pata No. 174, dated September 23, 1874, was in the name of Naurez. No. 175, of the same date, was in the name of Sanwan. No. 178, of the same date, was in the name of Khan Muhammad. Nos. 243 and 244, dated respectively July 23, 1875, and March 20, 1877, were in the name of Bugro. Although the patas were granted by Government to the persons named, the wah and lands held with it and comprised in the patas in fact belonged to the following proprietors: One moiety belonged to Nabibaksh and his brother Alibaksh, and the other moiety belonged as to one-third (or one-sixth of the entirety) to Naurez, and as to two-thirds (or



J. C.
1904

Khia Rajmal
v.
Daim.

two-sixths of the entirety) to Khan Muhammad, Sanwan, and Bugro in equal undivided shares.

Two previous mortgages dated May 15, 1874, had been executed by these proprietors. One of these mortgages was by Nabibaksh (on behalf of himself and his brother Alibaksh), Naurez, Bugro, Sanwan, and Khan Muhammad in favour of Tekchand and Kodumal for Rs. 5600, and the other mortgage was by the same mortgagors in favour of Waliram, Kodumal, and Tekchand for Rs. 2,000. Waliram was a partner with Kodumal and Tekchand. These mortgages, like those of 1878, were usufructuary mortgages.

Before the execution of the mortgages of 1878 Naurez died leaving a widow and four children, including a son, Amirbaksh. Khan Muhammad died leaving seven children, including a son by his first wife named Kadurbaksh, and Sanwan died leaving a widow and four children, including a son, Sumar.

The first mortgage of June 4, 1878, was by Nabibaksh, on behalf of himself and Alibaksh only, of one moiety of the property for Rs. 4,300, made up of Rs. 2,470—one-half of the amount stated to be due on the first mortgage of 1874—Rs. 378 balance due on the second mortgage, Rs. 852 due on settlement of accounts, and Rs. 600 due in respect of one-half of the assessment and clearance expenses of the last year. It was in favour of Kodumal and Tekchand, and was an usufructuary mortgage for a term of five years from date, expiring, therefore, on June 4, 1883. The points deserving special notice are that one-fourth of one-half of the produce was reserved to the mortgagor for his maintenance and other expenses connected with the wah and land, and the responsibility of cultivation and looking after the land rested on the mortgagor in consultation with and with the consent of the Showkars.

On the same June 4, 1878, Kadurbaksh purported to convey the share of Khan Muhammad in the property, which he described as his share, to Bugro in consideration of Rs. 955 8a. 10p., being "his share" of the mortgage debts created by the two mortgages of even date which Bugro agreed to pay, but reserving to himself the land denoted by survey No. 30 in pata No 178, and containing eight acres, which he stated was his ancestral property. This small piece of land was also excepted from the two mortgages.



By the second mortgage deed of June 4, 1878, Bugro, Sumar, and Amirbaksh purported to mortgage the other moiety of the property to Kodumal and Tekchand for Rs. 4,300, made up in the same manner as in the first deed, for a like term of five years, and subject to the same stipulations as to cultivation and so forth. At this date Sumar and Amirbaksh were both minors.

It is apparent on the face of the mortgages of 1878 that as between the parties to these deeds the debts created by the previous mortgages of 1874 were satisfied, and, in fact, it is admitted in the appellants' written statement of defence, and in their case on this appeal, that the mortgages of 1874 were extinguished, but apparently only as between the parties.

Waliram, however, was not a party to the deeds of 1878, and on May 1, 1879, he commenced a suit (No. 372 of 1879) against Nabibaksh, Bugro, Summar, Kadurbaksh, and Amirbaksh, described as a "minor aged about fourteen years, legal representative of Naurez, deceased, by his guardian, his uncle Alahnawaz," to recover Rs. 249 10a. 3p. for principal and interest in respect of his share of the sum due under the mortgage to himself and his partners of May 15, 1874. The proceedings in this suit were somewhat extraordinary. On June 4, 1879, a petition signed by Waliram, Nabibaksh, Bugro, and Alahnawaz, described as "guardian of Amirbaksh," was presented to the Court praying that the points in issue between them should be referred for final disposal to the arbitration of Kodumal (the partner of Waliram). The petition was not signed by Kadurbaksh or Sumar, and appended to it was a postscript signed by the same parties praying that the names of Sumar and Kadurbaksh might be struck off from the suit. On the same day (June 4, 1879) the Subordinate Judge made an order for reference accordingly. Shortly afterwards Nabibaksh died leaving two widows, an infant son, Muhammad Hasan, and a daughter. The names of the widows and son were added to the record, and the usual summonses served on them to appear. Kodumal made his award that the plaintiff Waliram should recover Rs. 350 from Bugro, the property of Nabibaksh deceased, Sanwan deceased, Khanan or Khan Mahammad deceased, and Naurez deceased, in three instalments with interest, and the judge made an order, dated December 20, 1879, to that

J. C.
1904
Khizarajmal
v.
Diam.



J. C.
1904

Khizarajmal
v.
Daim.

effect. On February 8, 1881, the wah and lands (except the lands comprised in pata No. 174 in the name of Naurez) were sold in execution to Darianomal, son of Kodumal and gomashtha of his firm. It is not now disputed that he was benamidar for Kodumal and Tekchand. The sale purported to be subject to a mortgage to Kodumal for Rs. 5,600, meaning, apparently, the mortgage of May, 1874, and ignoring, therefore, the subsequent mortgage of 1878. By an inexplicable blunder it appears to have been assumed in making the sale that the lands were the property of the several persons in whom the patas stood, although the true facts as to the proprietorship were mentioned in the application for execution and in the memorandum of sale.

On April 29, 1878, Kodumal and Tekchand commenced a suit (No. 160 of 1878) against "Naurez, deceased, by his legal representative Amirbaksh, by his guardian, his uncle Alah Nawaz," the last named personally, and one Mubarak, to recover a sum stated to be due to them and one Motandas (who was also named as defendant) from Naurez, Alah Nawaz, and Mubarak on settled account. This suit was compromised for a lump sum of Rs. 519, and default having been made in payment the land comprised in pata No. 174, standing in Naurez's name, on October 11, 1880, purported to be sold in execution to one Ubhuromal, who shortly afterwards transferred it to Darianomal. In this case also it was assumed that pata No. 174, standing in the name of Naurez, was his exclusive property, although the true state of the title appeared on the proceedings in the suit.

The present suit was commenced on January 11, 1897. The original plaintiffs were Alibaksh, the heirs of Nabibaksh, Naurez, Sanwan, Khan Muhammad, and Bugro, and by amendment one Nur Muhammad, who is a purchaser of one-half of their interests, was added. The defendants were the sons of Tekchand and Kodumal, both deceased. The first question is whether the suit is barred by limitation. This point is put in two ways. It is contended that there has been adverse possession for more than twelve years of the equity of redemption, and the title of the appellants who now represent the original defendants cannot, therefore, now be disputed. Secondly, it is said that the defects in the proceedings in the two suits in which the equity of redemption was purported to be sold were at most irregularities which might entitle the parties to have the execution sales set



aside if they had come in time, but, no proceedings for that purpose having been brought within the time allowed by law, the sales are now unimpeachable. The circumstances relied on as evidence of adverse possession are—that since the dates of the execution sales no accounts have been demanded by or rendered to the mortgagors or their representatives, no payments of subsistence money which they were entitled to under the mortgages have been made to them, and the parties after the sale ceased to cultivate the land and left the village, and renewed patas have been granted to nominees of the mortgagees. If the purchasers had been independent third parties, and accounts had been rendered and payments made by the mortgagees to them instead of to the mortgagors, the circumstances relied on would have been cogent evidence of adverse possession of the equity of redemption in favour of such third parties. But their Lordships cannot differ from the finding of the appellate judge, that in each case the nominal purchasers were the agents only of the mortgagees, or the firm of which they were members, who were the real purchasers; and this was not seriously disputed by Mr. Arathoon. The firm appears to have consisted of many branches and contained many partners. Darianomal, the purchaser in suit No. 372 of 1879, was (as already mentioned) son of Kodumal and gomashita of the firm. In the language of the witness Khisarajmal, “Dariano bought the lands for the shop.” Ubhuromal, the other purchaser, was also an employee of some kind of one branch of the firm. As changes took place from time to time in the constitution of the firm, the mortgaged property as an asset of the firm was credited at an agreed figure in favour of an outgoing or against an incoming partner. But there have been no separate dealings with the equity of redemption as a distinct subject of property. Their Lordships are satisfied that the possession has been that of the mortgagees throughout, and the question at issue is exclusively one between mortgagor and mortgagee. As between them, neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem. It is almost unnecessary to add

J. C.
1904

Khisarajmal
v.
Daim.



J. C.
1904
Khia Rajmal
v.
Daim.

that a renewal of the patas or the making of a new settlement with Government in the names of nominees of the mortgagees did not alter the real title to the lands.

The question, therefore, is whether the equity of redemption not only purported to be, but was in fact sold under the decrees. Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But on the other hand the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions, it may be found in the judgment of Sir Barnes Peacock in *Kishen Chuunder Ghose v. Mussumat Ashoorun*.¹

It will be convenient to consider the case of each of the mortgagors separately. In doing so it will not be necessary for their Lordships to consider whether there is sufficient evidence of fraud or chicane on the part of the mortgagees, or whether the proceedings in suit No. 372 of 1879 deserved the epithets which the appellate judge applies to them. Those proceedings were conducted with great irregularity, but the only question for consideration is whether the Court had jurisdiction to sell the property which purported to be sold. In suit No. 160 of 1878 it will be remembered that none of the persons interested were parties to the suit except Amirbaksh, sued as representative of Naurez, deceased.

Nabibaksh was a defendant to the suit No. 372 of 1879, and signed the agreement of reference. On his death very shortly afterwards his two widows and his son Muhammad Hasan, aged about six years, by his mother, one of the widows, were named as his legal representatives on the record. The judge was satisfied by evidence that they were served with a summons to appear, and that they were prepared to accept the award of the arbitrator; and they were also served with notice of the sale. Their Lordships think that Nabibaksh's estate was sufficiently represented for the purpose of the suit although the name of

¹ Marshall, 647.



J. C.
1904
Khierajmal
v.
Daim.

his infant daughter was omitted, and that his share of the equity of redemption in the property sold in execution of the decree in No. 372 of 1879 is therefore bound by the sale, and irrademable. This share was one-fourth, or (say) six twenty-fourths. Nabibaksh, however, executed the mortgages of 1878 on behalf of his brother Alibaksh as well as of himself. Alibaksh is still living, and is a plaintiff in the present suit and one of the respondents. It must be presumed that Nabibaksh was authorized to sign the mortgages for his brother. At any rate, Alibaksh by suing for redemption admits it. And possibly it might have been held that Nabibaksh's authority extended to representing him in Waliram's suit. But by no possibility could it be considered that he was represented by the widows or infant son of his deceased brother. In fact, his interest in the property seems to have been ignored altogether. He is not mentioned as a debtor in the award, and there is no decree against him. The Court, therefore, had no jurisdiction to sell his share, amounting to six twenty-fourths.

The next share to be considered is Naurez's original $\frac{1}{2} \times \frac{1}{2}$ or $\frac{1}{4}$. Amirbaksh was, of course, one of the heirs of Naurez, but in no other sense his legal representative. It is not pretended that Alahnawaz was in any legal sense or in fact his guardian, or was ever appointed his guardian *ad litem*. It is, however, contended by the appellants that Naurez's heirs are bound by the proceedings in both suits, and that his share of the property, whatever it was, was effectually sold in the suit No. 160 of 1878, or at any rate that the share of Amirbaksh himself passed by the sale. The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shewn to the absent minors. But these are usually cases where the person named as defendant is, de facto, manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control. The appellants relied on the judgment of this Board in *Malkarjun v. Narahari*.¹ In that case

¹ L. R. 27 Ind. Ap. 216.



J. C.
1904
~
Khiarajmal
v.
Daim.

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¹ Marshall, 647.



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J. C.
1904

Khierajmal
v.
Daim.

¹ L. R. 27 Ind. Ap. 216.



J. C.
1904

Khizarajmal
v.
Daim.

a judgment had been given against a debtor, who afterwards died, and in executing the decree against his estate a person was served, as his heir, with notice of the intended sale. The person served objected (as it was proved rightly) that he was not the heir of the deceased, but the Court overruled the objection. The purchaser at the sale was a stranger, and not the judgment creditor. It was to this state of circumstances that Lord Hobhouse's observations were directed. His Lordship said: "He (the person served) contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake it is true, but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed." Their Lordships think that these observations do not apply to the case now before them. In suits No. 372 of 1879 and No. 160 of 1878, the judge seems to have accepted without question the statement on the record that Amirbaksh was legal representative of Naurez, and Alahnawaz was his guardian and never applied his mind to the matter. Doubtless he would have done so if the suits had proceeded in the ordinary course, but in the former case the proceedings were cut short by the agreement for reference, and in the latter case it was in effect a consent decree. It was not, therefore, the case of an erroneous decision, ruling, or exercise of discretion of the judge in a matter in which the Court had jurisdiction. Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits, and the sale of his property was therefore without jurisdiction and null and void. Nor can they hold that the share of Amirbaksh himself in his father's estate was bound. In the opinion of their Lordships it is not a mere question of form, but one of substance. In coming to this conclusion their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale; but in the present case the real purchaser was the judgment creditor, who must be held to have had notice of all the facts.



Sumar and Kadurbaksh never signed the agreement for reference to Kodumal in suit No. 372 of 1879, and the Court was asked to strike their names out of the record. They were not, therefore, parties to any of the subsequent proceedings which were founded exclusively on the agreement, and it is immaterial whether their names were actually removed from the record or not. Sanwan's share ($\frac{1}{8} \times \frac{8}{24}$) and Khan Muhammad's share ($\frac{1}{8} \times \frac{8}{24}$), therefore, did not pass by the sale in suit No. 362 of 1879, subject to the question of what passed by the conveyance from Kadurbaksh to Bugro.

It is admitted that Bugro's share (in patas 175, 178, 243, and 244) is irredeemable, and their Lordships think that this includes whatever he took by conveyance from Kadurbaksh. By the deed of June 4, 1878, Kadurbaksh purported to convey the whole of Khan Muhammad's share, except the land denoted by survey No. 30 in pata 178. Whether he did so in fact (that is to say) whether he had by some means acquired it from his father, or whether he was authorized to sell more than his own heritage, is a question which has not been argued before their Lordships, and there are no materials upon which they can form an opinion. *Prima facie* his conveyance would pass only his own share, but if there be any question upon it the point must be decided in the Court below. Except so far as Khan Muhammad's interests vested in Bugro, his estate is not bound by either decree. In any case the lands denoted by survey No. 30 in pata 178, being excepted from the mortgages, are not redeemable in this suit.

Their Lordships, therefore, substantially agree with the appellate judge as to his view of the facts of the case. But the judge has made a decree for redemption of the whole estate, on the ground that "the mortgagees could not acquire the equity of redemption directly or indirectly by purchase at a Court sale except by a suit brought on the mortgage, on account taken and time specially allowed for redemption." Their Lordships cannot concur in this view, which they think is based on a misapplication of a sound principle of equity. Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his

J. C.
1904

Khia Rajmal
v.
Daim.



J. C.
1904

Khizarajmal
v.
Daim.

obligations as mortgagee, or deprive the mortgagor of his right to redeem on account taken, and with the other safeguards usual in a suit on the mortgage. But in Waliram's suit the parties agreed that the points in issue in the suit should be referred to arbitration, and the case was taken out of the hands of the Court. In suit No. 160 of 1878 the debt sued for was not the mortgage debt. The creditors were different and the debtors were different, and the debt does not appear from the plaint to have been secured by a mortgage. In any case the point taken by the appellate judge would not be a cause of nullity for want of jurisdiction, but a case irregularity in procedure only.

The result is that the respondents between them are entitled to redeem (1) the whole of the lands comprised in pata No. 174, and (2) the wah and the lands comprised in the other four patas, except the original six-twenty-fourths share thereof of Nabibaksh, and the original $\frac{1}{3} \times \frac{8}{24}$ share thereof to Bugro, and whatever share was conveyed to him by Kadurbaksh by the deed dated June 4, 1878, and except the land denoted by survey No. 30 in pata 178. The account of what is due on the mortgages to the appellants has already been taken, and the judge has rightly added the two sums of Rs. 325 and Rs. 300 paid by the purchasers on execution of the decrees in the two suits No. 160 of 1878 and No. 372 of 1879. But the judge has not allowed interest on these sums on the ground that no money in fact passed. The debts, however, were discharged in whole or in part, and there seems to their Lordships to be no reason why interest should not be allowed on these sums also.

Their Lordships, therefore, will humbly advise His Majesty that the decree of the appellate judge, dated March 9, 1900, be varied by (1) a declaration that the plaintiffs or some of them are entitled to redeem the above-mentioned shares in the wah and lands in suit; (2) directions to ascertain (in case the parties differ as to it) what share in the property in suit passed by Kadurbaksh's conveyance of June 4, 1878, and finally settle the shares which are redeemable and irredeemable having regard to the foregoing declaration and the result of such inquiry (if any), and to apportion the sum of Rs. 7885 14a. 6p. mentioned in the said decree, with interest thereon (including the two sums of Rs. 325 and Rs 300) at 9 per cent. per annum



from March 2, 1900, and the amount of surplus of profits and mesne profits when ascertained in the shares in which the property in suit is ascertained to be redeemable and irredeemable, and for otherwise carrying into effect the foregoing declaration, and that quoad ultra the said decree be affirmed and the suit be remitted to the Sardar Court of Sindh to proceed accordingly.

J. C.
1904
Khizarajmal
v.
Daim.

No costs were given of the appeal to the Sardar Court, and there will be no costs of this appeal.

Solicitors for appellants: *T. Wilson & Co.*

Solicitors for respondents: *Barrow, Rogers & Nevil.*

NOTE.

This case was decided by the Privy Council before the passing of the present Civil Procedure Code (V. of 1908) and their Lordships of the Privy Council in delivering judgment remarked "their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage." This remark was referred to by the select committee appointed to consider the Civil Procedure Bill in their Report dated the 12th February 1908 in connection with the provisions of Ord. XXXIV r. 14 which has been substituted in the present Civil Procedure Code for Sec. 99 of the Transfer of Property Act (IV of 1882) which has been repealed by the Code. On the question of interpretation of Ord. XXXIV r. 14. See *Ganesh Singh v. Debi Singh* (1910) 32A. 377; *Bai Ganga v. Rajaram* (1911) 35B. 248. See also *Mahant v. Nathuni* (1911) 13 C. L. J. 664, 668. *Ashu v. Behari* (1907) 6 C. L. J. 320 s. c. 35 C. 61, 75; *Surjakumar v. Pramada Sundari* (1913) 17 C.W.N. 1039. *Sardar Singh v. Ratanlal* (1914) 36A. 516. Another important point noted in this case is the rule about the representation of the estate of deceased debtor during execution proceedings. "The Indian Courts" said their Lordships in 32C. 926, 314 "have properly exercised a wise discretion in allowing the estate of a deceased debtor to be represented by one member of the family and in refusing to disturb judicial sales on the mere ground that some members of the family who were minors were not made parties to the proceedings, if it appears, that there was a debt justly due by the deceased and no prejudice is shown to the absent minors." See also *Ramtaran v. Rameswar* (1907) 6C.L.J. 719, 722. But if the infant was not a party to the suit and at the time of sale there is no valid and operative decree against him, the sale held under these circumstances does not pass the right title and interest of the infant. See *Narendra v. Jogendra* (1914) 20 C.L.J. 469, 472.



J. C.
1904

Khizarajmal
v.
Daim.

Khizaraj Mal v. Daim was a case of minors, but the principle laid down there is also applicable to cases of lunatics where the court, through ignorance, assumes jurisdiction over a lunatic and such proceedings are nullity. *Hakimullah v. Nabinchandra* (1914) 20 C.L.J. 291, 293.

This case also deals with the circumstances under which the contravention of a statute is not merely an irregularity but renders the proceedings a nullity. See *Narsingh Narain v. Shiekh Jahi Mistry* (1911) 15 C.L.J. 3, 6.

MUSAMMAT RASHID-UN-NISA

v.

MAHAMMAD ISMAIL KHAN AND OTHERS.

[*Reported in L. R. 36.I.A. 168s.c. I.L.R. 31A. 572=13 C. W. N. 1182=10 C. L. J. 318=11 Bom. L. R. 1225*].

The judgment of their Lordships was delivered by

July, 30

SIR ANDREW SCOBLE.—Muhammad Sardar Khan, the father of the appellant, died on the 1st May, 1888, possessed of a half share in Mouzah Gaisupur and other property, and leaving as his heirs according to Mahomedan Law (1) Ulfat-un-nisa, an adult daughter by his first wife; (2) the appellant Rashid-un-nisa, aged 4 years, daughter by his second wife; and (3) a brother named Mauladad Khan. Each of them was entitled to a third share in the estate. He also left an illegitimate son, named Abdul Mujid Khan, for whom he made provision in his lifetime, by a gift of a share in his Mouzah of Gaisupur, leaving nine biswas of that property to be divided among his legitimate heirs at the rate of three biswas apiece.

At the time of his death, Sardar Khan was indebted to the following persons:—

(1) to Fateh Chand, for Rs. 8,280-11, under a decree dated the 18th December, 1882;

(2) to Achal Dās for Rs. 2,500, under a bond dated the 31st January, 1882;

(3) to Sant Law and Moti Lal, for Rs. 2,294-10, under a decree dated the 17th January, 1883; and

(4) to his brother Mauladad Khan, under a possessory mortgage deed for Rs. 14,000, dated the 18th May, 1886.

On the 9th May, 1888, Mauladad Khan filed an application for mutation of names in respect of Gaisupur, in favour of the three legal heirs of the deceased. This application was opposed by Ulfat-un-nisa, on the ground that Abdul Majid (who was then a minor and as to whose illegitimacy she was silent) was entitled to half the estate, to the exclusion of the brother, Mauladad Khan. And the matter was referred to the arbitration of one Abdul Karim Khan, who made his award under date the 12th January, 1889, whereby he gave the largest share of



1909.

Rashid-un-Nisa
v.
Muhammad Ismail
Khan.

the property to Abdul Majid, and reduced the share of the appellant Rashid-un-nisa from 3 to $2\frac{1}{4}$ biswas. In this arbitration, Ulfat-un-nisa represented herself as acting as guardian of the minors, Abdul Majid and Rashid-un-nisa, and her general attorney, one Siraj Ahmad, signed the award on their behalf. This award seems to have been so far acted on that mutation of names was ordered to be made in conformity with it.

While these proceedings were pending Ulfat-un-nisa, on the 18th July, 1888, applied to the District Judge of Meerut for a certificate of guardianship under Act 40 of 1858, in regard to both minors, and her application was opposed by Mauladad Khan as regards Rashid-un-nisa, on various grounds, one being that the minor was married to his son, Niaz Mahammad Khan, and that he "maintained and looked after" her. He therefore asked that a certificate of guardianship might be granted to himself. His petition is dated the 2nd August, 1888; and by an Order of the District Judge of Meerut, dated the 13th April, 1889, it appears that Ulfat-un-nisa had withdrawn her claim, and a certificate of management of the girl's estate was granted to Mauladad; but, as "uncle cannot properly be constituted guardian of the girls's person," the Judge directed that she should "remain in charge of her half-sister Ulfat-un-nisa."

Meanwhile, Mauladad was actively engaged in settling the claims against Sardar Khan's estate. On the 6th April, 1889, he purchased, in the name of his four sons, the decree held by Sant Lal and Moti Lal, for the sum of Rs. 2,500; and on the 8th April, 1889, he purchased, in the same names, the claim of Achal Das for the sum of Rs. 3,000. On the 10th June, 1889, he purchased, in his own name, the decree held by Fateh Chand for the sum of Rs. 12,842-2. He thus became the sole creditor of Sardar Khan's estate. He died on the 22nd July, 1893, and the present respondents are two of his sons, and the representatives of a third son.

The fourth son, Niaz Muhammad Khan, who, as has already been stated, is the husband of the appellant, instituted the present suit on behalf of his wife, then a minor of fourteen-years of age, on the 21st September, 1898. The object of the suit is to obtain a declaration that two decrees and three sales in execution affecting her share in her father's estate are invalid as against the appellant, who was a minor and not legally



represented in the proceedings from which they resulted ; and, for the same reason, that the submission to arbitration, and consequent award, reducing her share from 3 to $2\frac{1}{4}$ biswas, are not binding on her.

It was not seriously contended before their Lordships that these arbitration proceedings, so far as the appellant's interest is concerned, could be supported. She was then about four years of age, and her consent seems to have been taken for granted to what was no doubt considered a fair family arrangement. But it has never been ratified by her, and is inoperative as regards her interest in her father's property. It is true that, in the award, her sister Ulfat-un-nisa is described as acting "for herself and as guardian of Abdul Majid Khan and Rashidan, minors"; but at the date of the award, the 12th January, 1889, an application was actually pending in her name in the Court of the District Judge of Meerut for a certificate of guardianship of these minors, and this application was rejected by the above-mentioned order of the 13th April, 1889. The statement in the award was therefore unjustified, and the appellants is entitled to the declaration which she seeks, that the award is a nullity, as far as she is concerned.

Mauladad Khan, as has already been stated, had in 1889 got into his own hands all then existing claims against Sardar Khan's estate, and after a short interval, he proceeded to realize them. On the 23rd April, 1891, he applied for execution of Fateh Chands's decree, and in his application the appellant is described as "Musammat Rashidan, minor, under the guardianship of her sister Musammat Ulfat-un-nisa." On the 16th May, 1891, a similar application was made, in the name of his four sons, for execution of Sant Lal's decree, and in it the appellant is described as "minor...under the guardianship of Mauladad Khan," and there is no room for doubt that, though the sons were the nominal applicants, Mauladad was the person really interested in the application. In the sales which followed on these applications, the decree-holders were, in both cases, the purchasers. On the 26th May, 1891, Mauladad brought a suit to recover interest on the mortgage which he himself held, and in the plaint, the appellant is described as "under the guardianship of her sister Ulfat-un-nisa," who, he states, is "certificated guardian of her person," and "has been made guardian *ad*

1909.

Rashid-un-Nisa
v.
Muhammad Ismail
Khan.

1909.

Rashid-un-Nisa
v.
Muhammad Ismail
Khan.

litem." In this case the decree was made in the absence of both the female defendants. No step appears to have been taken to enforce the bond to Achal Das until after Mauladad's death, which occurred on the 22nd July, 1893. On the 4th January, 1894, his four sons put the bond in suit, and obtained an *ex parte* decree on the 28th August, 1894. In this case also the appellant is described as "under the guardianship of her sister," who, by order of the Court, dated 10th March, 1894, was appointed guardian *ad litem*. The possessory mortgage in favour of Mauladad Khan is admittedly still in force.

The learned Subordinate Judge found that the proceedings impeached in the plaint failed as against the plaintiff (appellant), because she was not properly represented in them. He held that Ulfat-un-nisa, as a married woman, could not have been appointed guardian *ad litem*, and that Mauladad, whose sons were merely *benami* purchasers on his behalf, had an interest adverse to that of the minor, and was therefore disqualified. The High Court on appeal set aside his decree, and dismissed the suit upon the ground that "the decrees upon which the execution proceedings were founded are not in any way impeached in the suit, nor could they be. The impeached transactions were proceedings on those decrees in execution, and, this being so, it was the proper course for the plaintiff, if she had any objection to make to the execution of the decrees, to raise these objections under the provisions of section 244 of the Code of Civil Procedure and not by a separate suit."

With all respect to the learned Judges of the High Court, their Lordships are unable to agree with this conclusion. Section 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. Her sister, Ulfat-un-nisa, was a married woman, and therefore disqualified under section 457 of the Code from being appointed guardian for the suit, and Mauladad's interest was obviously adverse to that of the minor. An ingenious argument was put forward by Counsel for the respondents to the effect that as Section 53, of the Guardian



and Wards Act (Act VIII, of 1890) gives a preference to the appointment of the guardian of the person of a minor as guardian for the suit, and as Ulfat-un-nisa was guardian of the person of her minor sister, she could properly have been appointed her guardian *ad litem* in these proceedings. But this argument is open to the obvious objection that the later enactment leaves Section 457 of the Code untouched, and that the effect of the two Statutes, read together, is that a proper guardian of the person of a minor may, if properly qualified, be preferred as his or her guardian *ad litem*.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be discharged with costs, and that, subject to the payment, or allowance on account, by the appellant of any sum that may be found to be due by her in respect of the possessory mortgage of the 18th May, 1886, the decree of the Subordinate Judge should be restored.

The respondents must pay the costs of the appeal.

Messrs. T. C. Summerhays & Sons—Appellant's solicitors.

Messrs. Ranken, Ford, Ford & Chester—Respondent's solicitors.

Appeal allowed.

NOTE.

This case deals with the meaning of the expression "parties to the suit" in section 47 (Section 244 Act XIV of 1882), Civil Procedure Code and lays down the rule that this section applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties, who have been properly made parties in accordance with the provisions of the Code. See also notes on *Upendranath v. Kusumkumari*, (1914) 42 C. 440.

This case also deals with the question of appointment of guardian *ad litem* of minor defendants (Section 457 of Act XIV of 1882, Ord. XXXII, r. 4 of Act V of 1908, Section 53 of the *Guardians and Wards Act*). See also *Narsingh Narain v. Sheikh Jahi Mistry*, (1911) 15 C. L. J. 3, 5. *Purnachandra v. Bejoychand* (1913) 18 C. L. J. 18.

1909.

Rashid-un-Nisa
v.
Muhammad Ismail
Khan.

RAJA MAKUND DEB

v.

GOPI NATH SAHU AND OTHERS.

[*Reported in 21 C. L. J. 45.*]

May, 26.

The judgment of the Court was delivered by

MOOKERJEE, J.—This is an appeal by the plaintiff suit for declaration of title to land and for ejectment of the defendants or, in the alternative, for assessment of fair rent payable by them. The defendants resisted the claim for ejectment, and contended that as they were permanent tenure-holders under the plaintiff, the rent was not liable to enhancement. The Courts below have concurrently dismissed the suit. The District Judge has held that there was a strong body of documentary evidence to show that the defendants and their predecessors had been continuously recognised as holders of a permanent tenure from before 1837 and that there was no relevant evidence inconsistent with the existence of the tenure. The nature of the documentary evidence, upon which the Courts below have relied, may be briefly described. The first piece of documentary evidence in order of time is a settlement field book dated the 10th February, 1837 in which it is recorded that village Satrapur, now in dispute, was held by the predecessors of the defendants as mokaddams. The term mokaddam is applied to the interest of those who collected rent under Mahomedan rulers. The use of the word in the particular document in this sense is confirmed by the description of the predecessors of the defendants, as malguzardar or sarbarakar in a settlement robokari dated the 30th April, 1841. The Courts below have concurrently held that these documents, prepared at a time when there was apparently no dispute between the parties, furnished valuable evidence of a mokaddami tenure in the village in suit, which was in existence 70 years before the commencement of this litigation, and was held at the time by persons now represented by the defendants. The Courts below have also relied on two judgments, original and appellate, dated the 28th May and 20th November, 1839, respectively, passed in a suit in which the existence of the mokaddami tenure was asserted though unsuccessfully. The next document is a sale-certificate dated the 11th August, 1853



by which the sarbarakari tenure was sold in execution of a decree and was purchased by the ancestor of the defendants. Next year, the predecessor of the plaintiff, in execution of a decree for arrears of rent against the original holders of the sarbarakari tenure, attached the property and got a sale proclamation issued on the 27th April, 1854. The sale was apparently averted by the purchaser at the prior execution sale, and he and his successors continued in occupation of the tenure by payment of rent to the predecessors of the plaintiff. In 1894 the holders of the tenure effected a partition of the lands under an award of arbitrators dated the 28th December, 1894. The tenure was divided into two unequal shares, with different rentals, and this subdivision was sanctioned by a robakari dated the 7th September 1896 signed by the manager of the plaintiff landlord. Lastly in 1897 the defendants, who are the present holders of the two fragments of the original tenure, were recorded in the settlement proceedings as sarbarakars. On a review of this evidence, supplemented by oral evidence of possession and payment of rent, the Courts below have held that the tenure set up by the defendants had a lawful origin and a real existence from before 1837, and that they are not trespassers but permanent tenure-holders. On second appeal, an earnest endeavour has been made to assail this finding on the ground that it is based on an erroneous construction of the documentary evidence on the record. In our opinion, no question of construction of documents, such as may be raised and examined in an appeal from appellate decree, arises in the present case; but as the contrary view has been strenuously supported, it is desirable to reiterate the principle applicable to cases of this character.

In the case of *Nowbut Singh v. Chutter Dharee Singh*¹ Sir Richard Couch C. J. laid down the fundamental principle that the misconstruction of a document which is the foundation of the suit, being in the nature of a contract or a document of title, is a ground of special appeal; but special appeal does not lie because of a mistake as to the meaning of some portion of the evidence which is in writing, if it is connected with other evidence affecting its construction. This view was possibly not quite in harmony with that indicated in *Lalla Imrit Lall v.*

1914.

Makund Deb
v.
Gopi Nath.¹ (1873) 19 W. R. 222.



1914

Makund Deb
v.
Gopi Nath.

*Mahomed Lallzamah*¹, but is in accord with the rule laid down in *Udit Narain v. Maheswar Bux*², *Himmat Ali v. Nyamutollah*³, and *Bungshee Dhur v. Mudhoosoodun*⁴. No useful purpose would be served by a detailed examination of all the cases in which the rule laid down by Sir Richard Couch has been strictly applied, but reference may be made, amongst other cases, to the decisions in *Shib Chandra v. Chandra Narain*⁵, *Ananda v. Parbati*⁶, *Dursun v. Durbijoy*⁷, *Braja Mohan v. Thakur Das*⁸, *Bazlul Karim v. Satis Chandra Giri*⁹, *Benode v. Pasupati*¹⁰, and *Madan v. Manmatha*¹¹, where an unsuccessful attempt was made to obtain a reversal of the decision of the lower appellate Court on the ground that it was based on a misconstruction of documentary evidence. On the other hand, in the case of *Hara Sundar v. Basanta Kumar*¹², where a question arose as to the legal effect of a deed of dedication of endowed property, namely, whether the property became the absolute *debutter* of the deity or retained its secular character in the hands of the *shebait*, though subject to a religious charge, the matter was treated as one of law. There can, in our opinion, be no room for controversy as to the correctness of the principle which was accurately formulated by Sir Richard Couch, though there may have been occasionally a loose application of the rule. As Lindley, J., put it in *Chatenay v. Brazilian S. T. Coy.*¹³ the expression "construction" as applied to a document, includes two things, first, the meaning of the words, and, secondly, their legal effect or the effect which is to be given to them; the meaning of the words is a question of fact in all cases, whether we are dealing with a poem or a legal document: the effect of the words is a question of law. Consequently, where the document is of such a character that it does not create, modify, or extinguish the rights and obligations of the parties, or otherwise effect their status, no question of its legal effect arises, and consequently, the construction of such a piece of documentary evidence does not raise a question of law. This is well illustrated

¹ (1872) 1 W. R. 447.² (1867) Agra H. C. F. B. 32.³ (1875) 23 W. R. 250.⁴ (1875) 23 W. R. 406.⁵ (1905) 1 L. L. R. 32 Calc. 719; 1 C. L. J. 232.⁶ (1906) 4 C. L. J. 198.⁷ (1909) 9 C. L. J. 623.⁸ (1909) 10 C. L. J. 593.⁹ (1911) 13 C. L. J. 418.¹⁰ (1907) 13 C. W. N. 105.¹¹ (1911) 21 C. L. J. 42.¹² (1904) 9 C. W. N. 154.¹³ (1891) 1 Q. B. 79 (85).



by several cases decided by their Lordships of the Judicial Committee. In *Lachman Lal v. Kanahaya Lal* ¹ documentary evidence was adduced to prove the factum of an adoption. Lord Shand held that the question was not one of construction of one or more deeds which would be a question of law, but was a question as to the effect to be given to decrees, leases and other documents as evidence of the fact of adoption and its consequences. Again, in *Seenaperu v. Chokalingam* ² where their Lordships reversed the decision of the Madras High Court in *Chokalingam v. Mayandi* ³, the question was raised whether the transaction evidenced by a *muchilika* deed was a new grant or a confirmation with modification of a previous grant. Sir Andrew Scoble held that this was a question of the legal effect of the deed on which the title of the parties rested and was a question of law, upon which their Lordships disagreed with the Judges of the High Court. In the case of *Lala Fateh Chand v. Rani Kisen Koer* ⁴ where the question in controversy was, whether the plaintiffs had a proprietary title to the lands in suit, the construction of a *Wajib-ul-arz*, which had been prepared by the settlement authorities and which contained a record of the rights of the proprietors and the tenants, was treated as a question of law, on which their Lordships agreed with the Judges of the High Court; *Kishan Kunwar v. Fateh Chand*. ⁵ This case may possibly be regarded as just on the borderline, because in proof of their title, the plaintiffs relied not only on the *Wajib-ul-arz* but also on other documentary evidence which could not be properly called documents of title. Besides, the earlier decisions of the Judicial Committee in *Iman Ali v. Sardar* ⁶, *Parbati v. Chandarpal* ⁷, *Anant v. Durga* ⁸ and *Lali v. Murlidhar* ⁹, indicate that as to some of the entries, at any rate, in a *Wajib-ul-arz*, the question may be, not of construction in the strict sense, but only of evidentiary

1914.

Makund Deb
v.
Gopi Nath.

¹ (1894) L. R. 22 I. A. 51;
I. L. R. 22 Calc. 609.

² (1903) L. R. 31 I. A. 83; I. L. R.
27 Mad. 291.

³ (1896) I. L. R. 19 Mad. 485.

⁴ (1912) L. R. 39 I. A. 247 (255);
17 C. L. J. 1; I. L. R. 34 All. 579.

⁵ (1906) I. L. R., 29 All. 203.

⁶ (1898) L. R. 25 I. A., 161 (169)
I. L. R. 26. Calc. 81.

⁷ (1909) L. R. 36, I. A. 125; I. L. R.
31 All. 457; 10 C. L. J. 216.

⁸ (1910) L. R. 37 I. A. 101; I. L. R.,
32 All. 363; 12. C. L. J. 36.

⁹ (1906) L. R. 33 I. A. 97; I. L. R.
28 All. 488; 3 C. L. J. 594.



1914.
 Makund Deb
 v.
 Gopi Nath.

value. The case of *Nilmoni v. Kirti* ¹ is clearly distinguishable, as the question there related to the limits of the power of the Judicial Committee in the hearing of an appeal when there are concurrent findings of fact by two Indian Courts; such powers, though artificially restricted by well recognized rules of practice are still wider than those of a Court of second appeal. To put the matter briefly, if there is a question of the legal effect of a deed or of a legal inference to be drawn from the facts bound, there is a good ground of second appeal. This is conclusively shown by the decisions in *Sevvaji v. Chinna* ², where the question arose whether a transaction could be treated as a mortgage when its alleged character as a sale had not been established, *Lachmeswar Singh v. Manwar Hossein* ³ and *Ram Gopal v. Shamskhaton* ⁴ where the question arose whether possession was of an adverse character, *Rampal v. Balbhadaar* ⁵ where the question arose whether knowledge of facts on the part of an agent could be imputed to the principal, *Maharam v. Telamuddin* ⁶; *Krishna Kishore v. Mir Mahomed* ⁷; *Sulatu v. Jadu Nath* ⁸; *Maruti v. Banubai* ⁹ where the question arose whether a tenancy was of a temporary or of a permanent character, and *Girdhar v. Ram Autar* ¹⁰ where the question arose, whether a prior charge had been kept alive or extinguished. The case of *Rajaram v. Ganesh Hari* ¹¹ where the question arose, whether existence of title could be inferred from acts of ownership, which was treated as a mixed question of law and fact, may possibly be deemed to be on the border line. We hold accordingly that, unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit, a second appeal does not lie. A second appeal is not admissible, merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower appellate Court. *Protap v.*

¹ (1893) L. R. 20 I. A. 95; I. L. R. 20 Calc. 847.

² (1864) 10 M. I. A. 151 (164).

³ (1891) L. R. 19 I. A. 48; I. L. R. 19 Calc. 253.

⁴ (1892) L. R. 19 I. A. 228; I. L. R. 20 Calc. 93.

⁵ (1902) L. R. 29 I. A. 203; I. L. R. 25 All. I.

⁶ (1911) 15 C. L. J. 220.

⁷ (1899) 3 C. W. N. 255.

⁸ (1904) 8 C. W. N. 774.

⁹ (1902) 4 Bom. L. R. 801.

¹⁰ (1904) 8 C. W. N. 690.

¹¹ (1895) I. L. R. 21 Bom. 91.



Mahendra ¹; *Durga v. Jowahir* ²; *Ramratan v. Nandu* ³; *Lachman v. Kanahiya* ⁴; *Shibabashaba v. Sangappa* ⁵; and *Hari Mohan v. Surendra Narain* ⁶. In our opinion, the decision of the District Judge does not involve any error of law and there is no ground for this second appeal. The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

BEACHCROFT J.—I agree.

Appeal dismissed.

NOTE.

The right of appeal is a substantive right of a very valuable nature and cannot be taken away by mere implication. Where the Legislature wants to take it away it does so expressly. Section 101 Civil Procedure Code says that no *second* appeal (appeal from appellate decree) shall lie except on the grounds mentioned in section 100.

Now, is the erroneous construction of the documentary evidence on the record a good ground for second appeal? In the present case the learned Judges trace the history of the rule on this subject, refer to the conflicting decisions (pp. 49-51) and lay down the rule thus—if there is a question of the legal effect of a deed or of a legal inference to be drawn from the facts found, there is a good ground of second appeal (p. 51.) Unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of the suit, a second appeal does not lie. (p. 52.)

¹ (1889) L. R. 16 I. A. 233; I. L. R. 17 Calc. 291.

² (1890) L. R. 17 I. A. 122; I. L. R. 18 Calc. 23.

³ (1891) L. R. 19 I. A. 1; I. L. R. 19 Calc. 249.

⁴ (1894) L. R. 22 I. A. 51; I. L. R. 22 Calc. 609.

⁵ (1904) L. R. 31 I. A. 154; I. L. R. 29 Bom. 1.

⁶ (1907) L. R. 34 I. A. 133, I. L. R. 34 Calc. 718; 6 C. L. J. 19.

1914.

Makund Deb
v.
Gopi Nath.

KAMINI DEBI

v.

PROMOTHA NATH MUKERJEE AND ANOTHER.

[*Reported in 20 C. L. J. 476, s. c. 19, C. W. N. 755.*]

The judgment of the Court was delivered by

MOOKERJEE J.—The question for decision in this appeal relates to the competency of an appeal presented to the District Judge. The defendant is a shebait of an endowment created by one Ramkamal Mukherjee on the 4th February 1845, the history of which is set out in our judgment in *Aghore Nath Mookerjee v. Kamini Debi*¹. The plaintiffs seek a declaration that the defendant is utterly unfit for the post of shebait, and they ask accordingly for a decree for her removal and for the appointment of a fit and proper person to the post of shebait according to the provisions of the will of the founder. The plaintiffs also claim an account of the income and expenditure of the endowed properties from the defendant. For the preservation of the property during the pendency of the suit, they also pray for a temporary injunction to restrain the defendant from wasting the estate, or, in the alternative, for the appointment of a Receiver. Finally the plaintiffs seek a decree for damages against the defendant and invite the Court to draw up a scheme for the future management of the endowed properties and the performance of the worship as contemplated by the founder. The defendant resists the claim on the ground, amongst others, that the plaintiffs have no right to maintain the suit. Twenty issues were framed: of these the first was in these terms: 'Have the plaintiffs any cause of action? Have the plaintiffs any right to sue?' This was amplified in the seventeenth, eighteenth and nineteenth issues, in which the grounds for the contention that the plaintiffs have no right to sue were specifically set out. The seventeenth issue raised the question whether the plaintiffs had a right to sue inasmuch as one Aghore Nath Mukherjee was alive. The eighteenth issue raised the question whether the plaintiffs were competent to maintain the suit inasmuch as they were not born during the lifetime of the founder. The nineteenth issue raised the question, whether,

¹ (1909) 11 C. L. J. 461.



upon a proper construction of the will of the founder, the plaintiffs were entitled to maintain the suit? The twentieth issue then raised the question, whether the defendant was estopped by reason of the doctrine of estoppel from raising the questions mentioned in the three preceding issues.

The Court of first instance first took up these issues in bar and decided them against the defendant. Before the suit could be heard on the merits, the defendant lodged an appeal before the District Judge against the decision of the Subordinate Judge in which he had held that the plaintiffs were competent to maintain the suit and that the question of its competency could not be raised by the defendant by reason of the decisions in previous suits. Before the District Judge, the objection was taken that the appeal was incompetent inasmuch as there was no decree which could be questioned by way of appeal. The District Judge gave effect to this contention and dismissed the appeal. On the present appeal, it has been argued on behalf of the defendant that the decision of the Subordinate Judge upon the question of the right of the plaintiffs to maintain the suit was a preliminary decree within the meaning of section 2 of the Code of Civil Procedure of 1908 and that the propriety of such a preliminary decree could be questioned by way of appeal to the District Judge. In fact, it has been contended that in view of the provisions of section 97 of the Code, it is obligatory upon the defendant to question the propriety of the decision of the Subordinate Judge at this stage. In support of this view, reliance has been placed upon the cases of *Krishnaji v. Maruti Appa*¹ and *Sidhanath Dhonder v. Ganesh Govind*.²

Clause (2) of section 2 of the Code of Civil Procedure defines the term 'decree' to mean the formal expression of adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final. It has not been disputed that in the case before us, there is no formal expression of adjudication by the Court of first instance. But the defendant is in no way to be blamed for this circumstance. An application was made to the Subordinate Judge in this behalf and he was invited to draw

1914

Kamini Debi
v.
Promotha Nath.

¹ (1910) 12 Bom. L. R. 762.

² (1912) 1 L. R. 37 Bom. 60.

1914

Kamini Debi
v.
Promotha Nath.

up a decree. He refused to accede to this application, on the ground that his decision was not equivalent to a preliminary decree. Consequently, if his decision was in reality a preliminary decree, the mere omission on the part of the Court to embody its effect in a formal expression, would not negative the right of the party affected to prefer an appeal. The substantial question for examination is, whether the adjudication has in fact determined the rights of the parties with regard to one of the matters in controversy in the suit. It has been contended on behalf of the appellant that one of the matters in controversy in the suit was, whether the plaintiffs were competent to maintain the suit, and that the Subordinate Judge has adjudicated upon this matter. If the expression 'matter in controversy' is understood in its widest possible sense, the argument advanced on behalf of the appellant may be supported. But the question remains, whether the expression "matter in controversy in the suit" should be understood in this comprehensive sense. On behalf of the respondents, it has been argued that the expression "matter in controversy in the suit" refers to the subject-matter of the litigation, and that if this view were not adopted, every question in dispute between the parties in the course of litigation, may be deemed to fall within the expression "matter in controversy in the suit." In our opinion, the view put forward on behalf of the appellant is unsound and should not be accepted, though it is supported by the decision in *Sidhanath Dhonder v. Ganesh Gavind*¹. In that case, the Subordinate Judge gave his decisions on issues relating to misjoinder, limitation and jurisdiction in favour of the defendants and directed the parties to adduce evidence on the merits. He refused to draw up a preliminary decree, embodying his decision upon the questions of limitation, misjoinder and jurisdiction. The High Court of Bombay held that he committed a material irregularity in the exercise of his jurisdiction. With all respect for the learned Judges who decided that case, we are unable to accept the interpretation they put upon the expression 'matter in controversy in the suit.' The result of this interpretation is that the parties would be bound, in view of section 97 of the Code, to challenge by way of immediate appeal the decision of the Court upon

¹ (1912) I. L. R. 37 Bom. 60.



every one of the points in dispute between them in the course of the litigation, so that the trial of the suit might be interrupted from time to time and might ultimately be extended over many years. We are not prepared to hold that this could ever have been intended by the Legislature. Besides this, if the decision of the Court upon each of the points in dispute is deemed a preliminary decree, there must be a number of preliminary decrees in the suit. But, as was pointed out in the case of *Bharat Indu v. Yakub Hasn*¹, the intention of the Legislature appears to have been that there should be only one preliminary decree in the suit to be followed by one final decree: *In the matter of Rajah Pertab Chunder Singh*². The cases where the Legislature contemplated the preparation of a preliminary decree, are specified in Rules 12 to 18 of Order XX of the Code; it is not disputed that the case before us is not comprised within any of those Rules. It is further clear that the preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree. If this distinction is borne in mind and is applied to the case before us, what is the position? The decision of the Subordinate Judge, so far as it goes, merely holds in favour of the plaintiffs that they are entitled to maintain the suit. Their right to obtain the reliefs claimed against the defendant has not yet been affirmed. On behalf of the appellants, however, much reliance was placed upon the decision of the Judicial Committee in *Bhup Indar Bahadur v. Bijai Bahadur*³ where their Lordships held that the decision of the Court determining the extent of the period for which the judgment-debtor was liable to pay mesne profits to the decree-holder was a decree within the meaning of the Code. There is plainly no real analogy between the case before the Judicial Committee and the case now before us. The order made by the Subordinate Judge does not decide the extent or character of the liability of the defendant; it does not affirm that she is or is not liable to be removed from the position of shebait or to be called upon to render accounts in respect of the trust. Her position now is radically different from what it would have been, if the plaintiffs had obtained a real preliminary decree directing her removal

1914

Kamini Debi
v.
Promotha Nath.

¹ (1913) I. L. R. 35 All. 159.² (1867) 7 W. R. 222.³ (1900) I. L. R. 23 All. 152; L. R. 27 I. A. 209.

1914

Kamini Debi
v.
Promotha Nath.

from office or declaring their right to take accounts from her. Should that stage be ever reached, the defendant would undoubtedly be entitled to prefer an appeal against such a decision.

On these grounds, we must hold, upon a construction of section 2 of the Code, that the contention of the appellant is not well-founded and that the appeal preferred by her to the District Judge has been rightly adjudged incompetent. The view we take is in accord with that adopted in the cases of *Shib Sharan Sha v. Janaki Nath Dey*¹, *Parsotam Rao v. Radha Bai*², and *Kashi Nath v. Nathuram*³. The case of *Krishnaji v. Maranti Appa*⁴, on which the appellant relied, is distinguishable on the ground that, in the opinion of the Court, the decision challenged by way of appeal involved a determination of the rights of the parties in regard to the manner in which the account between them should be taken, that is, it embodied a decision upon the question of the rights of the parties in respect of one of the matters in controversy in the suit itself. This, clearly, cannot be affirmed of the decision of the Subordinate Judge in the present case.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

NOTE.

The definition of the word "decree" has been altered to a large extent by § 2 (2) of the present Civil Procedure Code, and the changes made should be carefully noted. A decree according to this definition may be either preliminary or final. Section 97 of the present Civil Procedure Code says that where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. This rule has been laid down for the first time in this country by § 97, Civil Procedure Code. In reading § 2 (2) definition of "decree", the meaning of the expression "matters in controversy in the suit" should be noted. See p. 439 of the Report for difference of opinion between Calcutta and Bombay High Courts. The circumstances under which there may be a preliminary decree governed by § 97 have been specified in Rules 12 to 18 of Order XX of the Civil Procedure Code.

¹ (1913) 18 C. L. J. 78.

² (1912) 10 A. L. J. 78.

³ (1911) P. L. R. 115; P. R. 14.

⁴ (1910) 12 Bom. L. R. 762.

MALKARJUN (Original Defendant), *Appellant*.

v.

NARHARI AND ANOTHER (Original Plaintiffs), *Respondents*.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

[*Reported in (1900) L.R. 27 I.A. 216 s.c. I.L.R. 25 Bom.*
337=5 C. W.N. 10.]

The judgment of their Lordships was delivered by

January, 24.

LORD HOBHOUSE:—The respondents to this appeal represent the plaintiffs below, who instituted their suit on January 24, 1889. The defendant below is now represented by the appellant. The plaintiffs stated that on March 28, 1877, one Nagappa, whose heirs they are, mortgaged land to the defendant to secure the sum of Rs. 3,000; and they prayed for accounts and redemption of the mortgage.

The only defence which need now be considered was that in a suit instituted against Nagappa by a creditor of his named Vithal a decree was obtained in execution of which Nagappa's interest in the property was put up for sale; that it was purchased by the defendant on 9th June, 1880; and that on 11th October, 1880, possession was given to the defendant and had continued with him ever since. The plaint was wholly silent about this sale. The written statement went on to suggest that the plaintiffs might possibly contend that the sale was illegal because it took place without the plaintiffs being joined in the certificate as heirs. The defendant said that he waited to hear whether the plaintiffs would make any such case, but that if they did he had an answer to it; and he pleaded by anticipation that the legality of the sale could not be impeached in the present suit, one reason being that Vithal, the decree-holder, was no party to the suit. Finally, the defendant put in a distinct plea that the claim for redemption cannot be maintained unless a suit is brought to set aside the sale.

The plaintiffs persisted in their suit according to its original frame. Eleven issues were settled by the First Court. The first issue was whether the mortgage debt merged in the subsequent purchase. In point of form that issue was not adapted to the facts of the case; nor, as it was treated by the First Court, was



1900

Malkarjun
v.
Narhari.

it adapted in point of substance. There was no issue adapted to examine the propriety of the execution proceedings.

The First Court dismissed the suit on the ground, as the learned Judge expressed it, that the mortgage merged in the purchase. The plaintiffs appealed. They complained that proper issues had not been stated, and that they had been prevented from tendering evidence on points connected with the regularity of the execution proceedings. The defendant made objections to the same effect. But no further issues were stated, and no further evidence was given.

The Judge of the Second Court, the First Appeal Court, who is styled the Joint First Class Subordinate Judge, A.P. at Sholapur affirmed the decree below. As there has been no remand of the case on account of defects in the issues or evidence, his findings of fact are in this stage conclusive; and from them and the documents referred to in them the case appears to stand as follows. Vithal's decree was against Nagappa as principal debtor and Wyankappa as surety. The latter was Nagappa's son-in-law, being the husband of Tukava, one of the original plaintiffs in this suit. The date of the decree was 27th June, 1877. It is an important document, but there is no copy of it in the record. It is spoken of as a simple decree for payment of money; but from the terms of the application for execution which was made on 22nd November, 1878, it appears that the decree also related to some property which was mortgaged, and that on a previous application made in the year 1878 a trifling sum, Rs. 3-4-0, had been realised by sale of that property. The application is in a tabular form as required by the then Code of Procedure, the terms of which are those of section 285 of the existing Code of 1882. The name of the person against whom the execution is sought is given as "the estate of the deceased Nagappa." The names of the parties are given as first Nagappa deceased by his heir Ramlingappa, and secondly Wyankappa. The relief sought is sale of the immovable property of the deceased defendant for the realisation of Rs. 65 and a fraction, being the balance remaining due under the decree.

Notices were served upon Ramlingappa and Wyankappa. The former was the nephew of Nagappa, but was not his heir, the family having been divided as the Court has now found. On



the 23rd December, 1878, Ramlingappa appeared to show cause. What then took place appears from an entry of that date. Ramlingappa stated : "As Nagappa separated from my father even during [my father's] lifetime, I am not Nagappa's heir. His heir are his daughters" (and he named them, meaning to name the plaintiffs). "I have not with me any 'estate' of the deceased nor did I receive it. Therefore this decree should not be executed against me."

The Court's judgment was as follows. "The plaintiffs' application for execution is not against other property : it is against the 'estate' of the deceased. If [any] property belonging to you is included in that [estate], you should take legal steps after the attachment is levied."

After that the execution proceedings went on with the result that the mortgaged property was put up on the 9th June, 1880, to be sold subject to the charge then stated to be Rs. 3,680, and was bought by the defendant. It would appear that the property was considered to be worth nothing substantial beyond the mortgage debt ; the highest biddings for all the lots only amounting to Rs. 9-12-0.

The second Court dismissed the plaintiffs' appeal. The learned Judge proceeded on the ground that Ramlingappa was a legal representative of Nagappa within the meaning of the Code, because he was a relative of the deceased and was possessed of some of his property. He also relied on the presence of Wyankappa as a party to the execution proceedings, arguing that knowledge of them was thus brought home to the plaintiffs, and that they could not be allowed to lie by for years and then, after the property had increased in value, to treat the sale as invalid. If, he said, they objected to the proceedings as irregular, they ought to have sued within the year allowed by the law of limitation.

The plaintiffs appealed to the High Court, when there appeared a great variety of judicial opinion. The appeal was first heard before Sir Charles Farran C.J., and Parsons, J. The former of those learned Judges pointed out the insufficiency of the reasons assigned by the Courts below for their decrees. He held that notice should have been served on Nagappa's heirs and that in default of such notice the sale was informal and irregular and

1900
Malkarjun
v.
Narhari.

1900.
Malkarjun
v.
Narhari.

might be set aside on an application made in good time. Then he addressed himself to the question whether the sale, however, irregular, was a nullity; and he held that it was not, that it must be set aside before the plaintiffs could recover the property, and that they had never sued to set it aside. Parsons, J., on the other hand held that the sale was an entire nullity and that the plaintiffs were entitled to proceed as if it had never taken place.

Upon this conflict of opinion the case was referred to three other Judges of the High Court. Ranade, J., agreed with Parsons, J., that the Court had no jurisdiction at all to make the sale which was consequently a nullity. Candy, J., without deciding the point, assumed for the purpose of his judgment that the sale passed the property subject to challenge in a regular suit, but he held the present suit to be a suit for that purpose. He further held that the suit was brought in good time; apparently on the ground that the right to set aside the sale is subservient to the right to redeem, and that the necessity of impugning the sale arises from the defendant resisting the suit to redeem. Jardine, J., gives his reasons at length for holding that the Court had jurisdiction to order the sale and that the sale was not a nullity. But then he expresses agreement with Candy, J., as to the nature of the present suit and its competency. The decree of the High Court does nothing but direct accounts to determine what amount the plaintiffs must pay for redemption. It does not set aside the sale. It must therefore rest on the principle that the sale is an absolute nullity, though in fact only one of the Judges on the first hearing and one on the second hearing was of that opinion.

This is indeed the cardinal point of the case, and it is one of great importance to all those who take property under the apparent security afforded by a judicial sale; which in India is conducted not by the creditor who seeks payment, but by the Court itself. It is very unfortunate that the views which have prevailed in the High Court have not been supported by any argument at this bar. Their Lordships have done what they can to understand and appreciate the views of the two learned Judges, who think that the sale was a nullity, and to examine the authorities cited for that opinion, but they feel the disadvantage of being without a respondent.



It is not disputed that if the Court took proceedings wholly without jurisdiction the plaintiffs would remain unaffected by them, and two of the learned judges below go the whole length of affirming that the execution Court had no jurisdiction. But a decree had been made, and partially, though to a minute extent, executed against Nagappa; and his estate was liable to make good the balance. To enforce this liability was within the jurisdiction of the Court. If a judgment-debtor dies before full execution of a decree the creditor may apply for execution against his legal representative. To receive that application is part of the Court's jurisdiction. In point of fact the application made was against "the estate of Nagappa," and in another column Ramlingappa is named as his heir. The Court had jurisdiction to receive such an application and either to reject it as defective or to order some further proceeding. If Ramlingappa had actually been successor in title nobody could have objected to the regularity of the proceedings. If there had been a dispute who was heir or whether the property had or had not devolved upon the heir, it was for the Court to determine such matters for the purpose of the execution. If it had been found impossible to discover whether any representative of the deceased was in existence, it was for the Court to say what steps should be taken. All these matters, which might involve questions of nicety, were for the Court to decide. It is clear that the jurisdiction was not lost for the reason that the form of application might be open to exception. How was it lost afterwards?

The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it

1900.
Malkarjun
v.
Narhari.



1900
 Malkarjun
 v.
 Narghari.

served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact; and that if he is to be held bound to enquire into the accuracy of the Court's conduct of its own business no purchaser at a court-sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do.

As for authority, many cases are cited but their Lordships cannot find any decision which supports the one now under discussion. That which is relied on by Candy, J., is *Baswantapa v. Rann*.¹ In that case the creditor of a man who was dead sued his mother in the character of heir, whereas the real heir of the debtor was his widow. In August, 1878, the creditor obtained a decree *ex parte* upon which execution took place, and the debtor's property was transferred to the defendant in November, 1880. In 1881 a son, adopted by the widow of the debtor, sued by her as his guardian to recover the land. The plea of bar by time under article 12 of the Limitation Act was set up; and it was held that the article did not apply, because the sale was a nullity and there was no need to set it aside. In that case neither the debtor nor his estate were ever made subject to the decree of the Court, the liability never was established, and the process of execution had nothing to rest upon. The Court actually had not the jurisdiction which it purported to exercise. It is a different matter when the Court has by its decree established the debtor's liability and is in the process of working it out against his estate.

Other decisions are cited in which proper notices have not been served after decree; but on examining them they all appear to be cases in which proceedings have been taken, either under section 311 of the Code or by independent suit, within the year allowed for setting aside a sale. In such cases the necessity for distinguishing between irregularity and nullity does not arise; and general assertions of the invalidity of such sales, quite appropriate to the case in which and the purpose for which they

¹ (1884) 9 Bom. 86.



CIVIL PROCEDURE.

are used, are only misleading when separated from their context and applied to a case in which the distinction between irregularity and nullity is the cardinal point.

It is then necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. There can be no question that omission to serve notice on the legal representative is a serious irregularity, sufficient by itself to entitle the plaintiff to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods. It may be that the plaintiffs could unite a suit to set aside with one to redeem, and that the defendant's anticipatory plea of misjoinder would if tried have been overruled. But that need not be discussed, because their Lordships think it to be beyond reasonable dispute that this is not a suit to set aside the sale.

The plaintiffs have deliberately refused to make it such a suit in the face of the defendant's challenge. It can only be called a suit to set aside a sale in the sense in which any other suit might be so called if it prayed relief inconsistent with the validity of the sale. Candy, J., considers that the only thing wanting is a formal prayer to set the sale aside, and he says that if the plea had been raised that there was no such prayer, leave would have been given to amend. In fact the plea was raised at a time when the plaintiffs could amend at their option, but they did not do it. To give leave to amend at the hearing may have been in the discretion of the Court, but it would be very far from a matter of course to do so. It would be giving leave to institute a new suit with the date of an earlier one. The decree-holder would be affected by it. He would be a proper party and (unless there is some recognised practice in India to the contrary as to which Mr. Phillips could not inform the Board) a necessary one. The issues would be different. It cannot be denied that the conduct of interested parties at the time of sale may be a bar to them when they come to set it aside. The defendant said openly that if the plaintiffs made a case for setting aside the sale he had got an answer to it. If the plaintiffs then made such a case he must have been allowed to make his answer, and the issues raised by him or by the judgment-creditor must have been tried. When defeated in the first Court the plaintiffs complained that proper issues had not

1900
Malkarjun
v.
Narhari.



1900
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 Malkarjun  
 v.  
 Narhari.

been framed for trying points connected with the sale ; which was true, though it was their own fault ; but they did not ask to remodel their suit. When defeated in the second Court they complained that the Court had drawn presumptions as to their knowledge of the sale without issues or evidence, which was true ; but they did not ask to remodel their suit. In fact their case has been conducted throughout on the principle that the question of nullity was the sole question, and that they could not succeed on any other ground. To allow them now to shift their ground and to make a new case, and that too without allowing the defendant an opportunity of making the defence which, he says, he has in reserve, is wrong in principle and is calculated to work practical injustice.

In the case of *Jagadamba Chowdrani v. Dakshina Mohun*, reported in L. R. 13 Ind. App. p. 84,<sup>1</sup> the plaintiffs were reversionary heirs of a deceased Hindu, subject to the interest of his widows. They brought suits not long after the surviving widow's death to recover the estate. But adoptions had been made in 1853 and 1856, either of which, if valid, would displace the plaintiffs. The law of limitation applicable to the case (the Act of 1871) provided that a suit to set aside an adoption must be brought within twelve years after the date of the adoption. The plaintiffs sued, not to set aside the adoptions, but to recover the estate ; and they argued that their title was good until an adoption was set up ; that those who set it up must prove its validity ; which accordingly might be controverted by the plaintiffs. There was difficulty in the case because the expression "set aside an adoption" is inaccurate ; an adoption cannot be set aside, though its validity may be impeached ; and in fact the language was altered in 1877 before the appeal was heard. This Board found, however, that the expression had been frequently used in legal documents and was known to Indian lawyers as a short way of denoting any process in which the fact or the validity of an adoption was disputed. On that ground they held that the Legislature must have intended to place the specified limit on suits for these purposes. Then the suit, being rightly described as one to set aside an adoption, attracted the consequence that the time for suing ran from the date of the adoption, and that the suits of 1873 and 1874 were

<sup>1</sup> (1886) 13 Cal. 308.





barred. It is obvious that the expression "set aside a sale" is not attended by any such difficulty, because a sale, valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside. That brings us to the last point in this rather tangled controversy, *viz.*, what is the period allowed for setting a sale aside?

Their Lordships have discussed the nature of the suit in detail because the two learned Judges who affirm or assume the reality of the sale make the case turn upon it. But if the conclusion could be reached that the suit is one to set aside the sale, the result would be equally fatal to the plaintiffs. Article 12 (a) of the Limitation Act of 1877 provides that a suit to set aside a sale in execution of a decree must be brought within one year after the sale is confirmed. That seems precisely applicable to the present case. It is said by Candy, J. (with whom Jardine, J. agrees) that it had not been contended that the plaintiffs were bound to sue within the year: and he refers to a text-book for cases to show that the article does not apply to a suit for a declaration that the sale is inoperative as against the plaintiff. Here the sale is, as their Lordships hold, and as the learned Judge himself assumes, operative as against the plaintiffs though liable to be set aside for due cause.

The only case cited by the learned Judge himself is *Bhagvant Govind v. Kondi*, reported in 14 Bom. 279. In that case there was no judicial sale. Property was mortgaged by a Hindu, and after his death his widows, who seem also to have been guardians of his infant heir, sold the property to a trustee for the mortgagee. The heir sued to redeem, but not till after the expiry of the three years after his majority, which by article 44 of the Limitation Act are the limit of time for setting aside a sale by a guardian. In overruling the plea of limitation the Court made the following observations: "The necessity of impugning the sale of 1863 to the second defendant arises from the second defendant's resisting the plaintiff's suit to redeem the mortgage and is therefore subservient to that suit." That is the only reason for overruling the plea.

Candy, J., says that these observations apply exactly to the facts of the present case. Possibly they do, but their

1900  
Malkarjun  
v.  
Narhari.



1900  
Malkarjun  
v.  
Narhari,

Lordships find it impossible to grasp the reasoning behind them. If it means that the right to set aside the sale is kept alive as long as the right to redeem would subsist by virtue of the mortgage, the result is that the validity of the sale might be held in suspense for sixty years. The two learned Judges intimate that there is a limit of twelve years, but how that limit is arrived at does not appear. They treat the sale as valid until vacated, but apparently they allow it just so much validity as suffices to turn the possession of the mortgagee into the adverse possession of an absolute owner, and no more. But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law ; and it seems to their Lordships that the case must fall either within section 311 of the Code or within article 12 (a) of the Limitation Act of 1877, or within both ; anyway, there exists a bar by one year's delay.

The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such however seems to be the effect of the doctrine of subservience laid down by the Bombay High Court. In the adoption case just cited from 13 Ind. App. this Board remarked that there was no principle on which simple declarations of invalidity should be barred by the lapse of twelve years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property, is left open for twelve years after the death of the widow. Their Lordships make the same remark now. What is the justification for refusing to construe article 12 (a) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale ? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the article.

The High Court ought to have dismissed the plaintiff's appeal with costs, in accordance with the opinion of the learned Chief





Justice. Their Lordships will now humbly advise Her Majesty to make that order, reversing the decree appealed from. The respondents must pay the costs of this appeal.

1900  
Malkarjun  
v,  
Narhari.

*Appeal allowed.*

NOTE.

A notice under Ord XXI r. 22 (§ 248 Act XIV of 1882) is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In this case (25 Bom. 337) such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchaser having no notice of any irregularity, the sale was good unless and until it were set aside by appropriate proceedings for the purpose. But where no proper notice is served under order XXI r. 22 (§ 248 Act XIV of 1882) and the respondent has full notice of the irregularities of the procedure adopted, the rule laid down in *Malkarjine v. Narhari* (I.L.R. 25 Bom. 337) will not apply, *Raghunath v. Sundar Das*, (1914) L.R. 41 I.A. 251, 257 s.c. 20 C.L.J. 555, 562, s.c. 18 C.W.N. 1058, 1065.

Ord XXI r. 90 deals with the subject of setting aside of sale of immovable property sold in execution of a decree on the ground of material irregularity or fraud. "The tendency, however, of modern decisions" says Sir John Woodroffe (Civil Procedure in British India. 2nd Ed. p. 1015) "is to check judgments holding sales to be nullities on account of what are really mere irregularities in procedure".

It has been decided in this case that where the debtor and his estate were made properly subject to the decree, the fact that notice was given to a wrong person and sale took place without notice to the legal representative, though constituting a material irregularity, did not under the judicial sale a nullity. See also, *Levina Ashton v. Madhabmoni* (1910) 14 C.W.N. 560, 565. *Lakshmicharan v. Srischandra* (1910) 13 C.L.J. 162, 163. *Bepin v. Sosi* (1913) 18 C.L.J. 628, 632. *Golam Ahad v. Judhister* (1902) I.L.R. 30 Cal. 142, 147. *Shamsundar v. Jhumak Shah* (1911). 20 C.L.J. 337, 340 *Arjun Das v. Gunendranath* (1914) 20 C.L.J. 341, 344 s.c. 18 C.W.N. 1266, 1269, See also *Rajwantprasad v. Ramratan* (1915) L.R. 42 I.A. 171, 176.

"A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed". (25 Bom. 347). So when a deed of relinquishment operating to extinguish the plaintiff's right to a property is not void *ab initio*, if it is not set aside by a suit brought within the period of three years prescribed by law, the plaintiff's right to the property is gone. *Rameshwar v. Lachmiprasad*. (1903) I.L.R. 31 Cal. 111, 129, See also *Brohmanand v. Hemchandra* (1914) 18 C.W.N. 1016, 1020. *Khiarajmal v. Daim* (1904) I.L.R. 32 Cal. 296, 314.





# **Selection of Leading Cases**

**FOR THE USE OF B.L. STUDENTS**

*(Published under the authority of the University of Calcutta.)*

## **LAW OF EVIDENCE**

**Supplementary Cases**



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## TABLE OF CONTENTS

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|                                                                        | PAGE |
|------------------------------------------------------------------------|------|
| 1. Benimadhab Das <i>v.</i> Sadasook Kotary ...                        | 1    |
| 2. Amritalal Hazra and others <i>v.</i> King Emperor ...               | 5    |
| 3. Gobindachandra Shaha and another <i>v.</i> Dwarkanath<br>Patita ... | 14   |



# SELECTION OF LEADING CASES.

## LAW OF EVIDENCE.

BENI MADHAB DAS

v.

SADASOOK KOTARY.

[*Reported in I.L.R. 32 Cal. 437 (F.B.) s.c. 1 C.L.J. 155 = 9 C.W.N. 305.*]

The following is the order of reference to Full Bench by Maclean C. J., Harington and Bodilly JJ.:—

1905

“The Plaintiff is suing for damages for an alleged breach of contract for the sale and purchase of silver bars. There were several contracts, all in the same form. They are set out in the paper-book. On their face they appear to be ordinary mercantile contracts. The defendant alleges they were merely contracts for differences, and, in effect, were wagering contracts, and he claims to be entitled to go into evidence to prove this. The plaintiff contends that, having regard to the decision of a Division Bench of this Court in the case of *Juggernauth Sewbux v. Ram Dyal*<sup>1</sup>, the defendant cannot do this, whilst the defendant urges that he is so entitled, having regard to the observations of their Lordships of the Privy Council in the case of *Kong Yee Lone & Co. v. Lowjee Nanjee*<sup>2</sup>. The case of *Juggernauth Sewbur v. Ram Dyal*<sup>1</sup>, was not followed by the Madras High Court in the case of *Eshoor Doss v. Venkata Subba Rau*<sup>3</sup>, or by the Bombay High Court in the case of *Anup Chand Hem Chand v. Champsu Uger Chand*.

Incidentally the question was touched upon in the case of *J. H. Tod v. Lakhmi Das Pursottam Das*<sup>4</sup>. We incline to the opinion that the case of *Juggernauth Sewbux v. Ram Dyal*<sup>1</sup>,

<sup>1</sup> (1883) I.L.R. 9 Cal. 791.

<sup>2</sup> (1901) 5 C.W.N. 714; L.R. 28 I.A. 239.

<sup>3</sup> (1894) I.L.R. 17 Mad. 480 (481).

<sup>4</sup> (1888) I.L.R. 12 Bom. 585.

<sup>5</sup> (1892) I.L.R. 16 Bom. 441.





1905

Beni Madhab Das  
v.  
Sadasook Kotary.

cannot, in the face of the observations of the Judicial Committee in the case above referred to, be now considered as law.

In these circumstances the question we submit for the consideration of the Full Bench is, whether the decision reported in *Juggernaut Sewbux v. Ram Dyal*<sup>1</sup>, is now to be regarded as law."

The following judgments were delivered :—

MACLEAN C. J.—The question submitted to us is whether the decision in the case of *Juggernaut Sewbux v. Ram Dyal and others*<sup>1</sup> can now be regarded as law. With every respect to the learned Judges who decided that case, I should have been of opinion, apart from the expression of judicial opinion in the case, which I shall refer to in a moment, that, upon the true construction of Sec. 92 of the Indian Evidence Act, and specially having regard to proviso(1) of that section, that case had not been properly decided. It seems to me that the learned Judges have not given sufficient effect to the proviso in question. Without going into detail, it seems to me that it would be very difficult to hold that the case here did not fall within the precise terms of that proviso. But if there were any doubt upon this it seems to me that that doubt is set at rest by the observations of their Lordships of the Judicial Committee in the case of *Kong Yee Lone & Co. v. Lowjee Nanjee*<sup>2</sup>. One can hardly suppose that the learned Judges who then composed that Committee in making the observations they did, could have lost sight of the provisions of Sec. 92 of the Evidence Act, which is as binding in Rangoon, as in Calcutta. Their Lordships say "two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market. The question is of which nature were the dealings which formed the consideration for the notes sued on? Were they for genuine purchase of rice, or only for payment of money

<sup>1</sup> (1883) I.L.R. 9 Cal. 791.

<sup>2</sup> (1901) 5 C.W.N. 714; L.R. 28 I.A. 239.





by one or the other according to the changes and chances of the market?" How is the Court, in adjudicating on the case to ascertain what the circumstances are or what the real nature of the dealings was, unless the party who sets up that it is a wagering contract is allowed to go into evidence upon the matter? Under Sec. 30 of the Contract Act, agreements by way of wager are void. How is the Court to arrive at a decision whether or not an agreement is void on the ground that it is by way of wager unless it is open to the party, who sets up that it is, to go into the evidence? Upon these grounds I think that the question referred to us must be answered in the negative, namely, that the case mentioned in the question submitted cannot be regarded as law, and that with this intimation of our opinion the case must go back to the Referring Court. The costs of this reference will be left to that Court to deal with.

BRETT J.—I agree with the Chief Justice.

STEPHEN J.—I also agree with the Chief Justice.

MITRA J.—I also agree with the Chief Justice.

WOODROFFE J.—I agree that the question referred to the Full Bench should be answered in the negative. The rule of evidence which is embodied in the first paragraph of Sec. 92 of the Indian Evidence Act pre-supposes the validity of the transactions evidenced by the documents to which that rule is to be applied. If, therefore, that validity is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such cases, the Court is not bound by what has been described as the mere paper expressions of the parties and is not precluded from inquiring into the real nature of the transaction between them. The first proviso to that section, therefore, declares that any fact may be proved which would invalidate any document.

To prove that a contract is void as by showing that it is an agreement by way of wager is to invalidate it. It has been suggested however, that the only cases in which oral evidence may be given to invalidate a document are those specifically mentioned in proviso (1), namely, fraud, intimidation, illegality,

1905

Beni Madhab Das  
v.  
Sadasook Kotary.



1905

Beni Madhab Das  
v.  
Sadasook Kotary.

want of due execution or capacity, want or failure of consideration or mistake. But, in my opinion, this is not so, as the instances given are not exhaustive but, as appears from the use of the words "such as" are set out by way of illustration only. Assuming then that, as has been argued, the present case does not come within the term "illegality" (which it is unnecessary to consider), it is still within the words of the proviso. The admissibility, therefore, of such evidence as that which the defendant seeks to give in this case is not only not excluded by the general rule which is embodied in Sec. 92 but is expressly recognised by the first proviso to that section.

*Messrs. Manuel and Agarwalla* Attorneys for the Appellant.

*Mr. N. C. Bose* Attorney for the Respondent.

## NOTE.

The question of admissibility of oral evidence to vary the terms of a written document is one of the most important questions of law of evidence and is governed by §92 Indian Evidence Act. Oral evidence to be admissible in such cases must come under one or other of the provisions of this section. Interpretation of §92 Indian Evidence Act is the subject of this Full Bench case and the two main points decided in the case will be found in the judgment of Sir John Woodroffe J. The questions decided were not new questions. In *Juggernath v. Ram Dyal* (1883) I. L. R. 9C. 791 Mr. Sale (now Sir Stephen G. Sale) argued that, although evidence was not admissible to alter or vary the terms of a written contract, it was admissible for the purpose of showing illegality; but his contention was overruled by the Court. In 1901 the case of *Kong Yee Lone & Co. v. Lawjee Nanjee* (1901) 29 C. 461 s. c. 28 I. A. 239 was decided by the Privy Council. But that case did not in express terms overrule the decision of the Calcutta High Court in *Juggernath v. Ram Dyal*, although no doubt the effect of the Privy Council case is to weaken very much the authority of that case. Then came the case of *Sadasook Kotary v. Beni-madhab Das*, before Mr. Justice Sale in 1904 who on the ground that the case of *Juggernath v. Ram Dyal* was binding on him held that oral evidence in such cases was inadmissible. On appeal the appellate Court referred the matter to a Full Bench. The Judgment of Sale J. and the order of reference will be found in pp. 438, 439 of the report respectively.





## AMRITA LAL HAZRA AND OTHERS

v.

## KING-EMPEROR.

[*Reported in I. L. R. 42 Cal. 957, 995—999 ; 1013—1015 ; 1022—1026. s.c. 21 C.L.J., 331, 353—356 ; 365—367 ; 372—375. = 19 C.W.N. 677, 691—693 ; 700—701 ; 703—705*].

1915

The judgment of the Court was delivered by

MOOKERJEE J.—

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At the trial before the Sessions Judge, evidence was adduced by the prosecution to establish that some of the accused had associated with Pulin Behary Das in 1908 or 1910 and that they had been seen from time to time in the premises of the Dacca Anusilan Samiti whereof Pulin Behary Das was the leader. Exception was taken on behalf of the defence, to the admissibility of this evidence, but the objection was overruled. The objection has been reiterated in this Court, and we have been invited to pronounce a decision on the point. Evidence has been adduced to prove that Pulin Behary Das and some of his associates were convicted in 1912 of offences under section 121A of the Indian Penal Code, but no evidence has been given as to the nature of the activities of the Samiti, of the different grades of its members and of the extent of their participation in the ultimate aims and purposes of the society ; proof, in these respects could, indeed, be hardly attempted without reproduction of the voluminous evidence adduced at the trial of the Dacca Conspiracy Case. The defence, however, have elicited in cross-examination of the prosecution witnesses that the activities of the Anusilan Samiti were not known to have been in any way connected with bombs. In these circumstances, we have to decide whether evidence was admissible to prove that some of the present accused had in 1908 or 1910 associated with Pulin Behary Das and had been seen engaged in *lathi* play or in other innocent pursuits on the Samiti premises. In our opinion, the evidence was inadmissible and should have been excluded. The prosecution has relied upon section 14 of the Indian Evidence Act which is in these terms. " Facts showing the existence of any state of minds—such as intention, knowledge, good faith, negligence, rashness, ill-will or





1915

Amrita Lal Hazra  
v.  
King-Emperor.

good-will towards any particular person or showing the existence of any state of body, or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.” But, on behalf of the prosecution, the first explanation to the section, which is absolutely fatal to their argument, has been completely overlooked; “A fact relevant as showing the existence of a relevant state of mind must show that *the state of mind exists, not generally but in reference to the particular matter in question.*” We invited the counsel for prosecution to explain how evidence of association with Pulin Behary Das in 1908 or presence in his Samiti, could have any relevancy with reference to the particular matter in question before us, namely, the intention with which the first four accused had assembled in the room, rented by Sasanka, on the night of the 20th November, 1913; but not even a plausible answer was attempted. Illustrations (i), (j), (o) and (p) also plainly indicate that the contention of the prosecution is not well-founded. Nor can the prosecution derive any assistance from section 15 of the Indian Evidence Act, which is in these terms. “Where there is a question, whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of *similar* occurrences, in each of which the person doing the act was concerned, is relevant.” Reference, however, was made to a number of judicial decisions which throw light upon the questions in controversy, and particularly to *Attorney General v. Makin*,<sup>1</sup> *Blake v. Albion Life Assurance*<sup>2</sup>, *R. v. Rhodes*.<sup>3</sup> *R. v. Wyatt*<sup>4</sup>, *R. v. Bond*<sup>5</sup>, *R. v. Fisher*<sup>6</sup>, *R. v. Ellis*<sup>7</sup>, *R. v. Ball*<sup>8</sup>, *R. v. Rodley*<sup>9</sup>, *R. v. Shellker*<sup>10</sup>, *R. v. Hunt*<sup>11</sup>, *R. v. Geering*<sup>12</sup>, *R. v. Garner*<sup>13</sup>, *R. v. Cotton*<sup>14</sup>, *R. v. Jones*<sup>15</sup>, *R. v. Ollis*.<sup>16</sup> No useful purpose would be served by an analysis of the special facts of each of these cases, but the principles deducible

<sup>1</sup> (1894) A. C. 57; 17 Cox 704.<sup>2</sup> (1878) 4. C. P. D. 94.<sup>3</sup> (1899) 1 Q. B. 77.<sup>4</sup> (1904) 1 K. B. 118.<sup>5</sup> (1906) 2 K. B. 389.<sup>6</sup> (1910) 1 K. B. 149.<sup>7</sup> (1910) 2 K. B. 746.<sup>8</sup> (1911) A. C. 47.<sup>9</sup> (1913) 3 K. B. 468.<sup>10</sup> (1914) 1 K. B. 414.<sup>11</sup> (1820) 3 B. & Ald. 566; 22 R. R. 485; 1 St. Tr. N. S. 171.<sup>12</sup> (1849) 18 L. J. M. C. 215.<sup>13</sup> (1864) 3 F. & F. 681.<sup>14</sup> (1873) 12 Cox. 400.<sup>15</sup> (1877) 14 Cox. 3.<sup>16</sup> (1900) 2 Q. B. 758.





therefrom as to the law administered in England, may be briefly formulated. Facts similar to but not part of the same transaction as the main fact, are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts, although in general, inadmissible to prove the main fact or the connection of the parties therewith, is receivable after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character and the acts tendered must also have been proximate in point of time to that in question. It is plain that the principles thus formulated are of no assistance to the prosecution. The view we take is consistent with the decisions in *Emperor v. Vyapoory*<sup>1</sup>, *Mankura v. Queen-Empress*<sup>2</sup>; *Baharuddin v. Emperor*<sup>3</sup>; *Giridhari Lal v. Emperor*<sup>4</sup>; and *Emperor v. Debendra Prosad*<sup>5</sup>. With reference to the case last mentioned, it may be noted that the Court properly declined to follow *R. v. Holt*<sup>6</sup>, which is no longer authority: *R. v. Smith*.<sup>7</sup> We hold, accordingly, that the evidence of association with Pulin Behary Das and the Anusilan Samiti are irrelevant, for the purposes of proof of the conspiracy charged in this case, and should not have been admitted.

\* \* \* \* \*

Considerable stress, however, has been laid by the prosecution upon a list of names in cipher, found in the breast-pocket of a

1915

Amrita Lal Hazra  
v.  
King-Emperor.

<sup>1</sup> (1881) I. L. R. 6 Cal. 655;  
8 C. L. R. 197.

<sup>2</sup> (1899) I. L. R. 27 Cal. 139.

<sup>3</sup> (1913) 18 C. L. J. 578.

<sup>4</sup> (1909) 11 Cr. L. J. 428.

<sup>5</sup> (1909) I. L. R. 36 Cal. 573;  
9 C. L. J. 610.

<sup>6</sup> (1860) Bell 280; 8 Cox, 411.

<sup>7</sup> (1905) 20 Cox 804;

92 L. T. 208.



1915

Amrita Lal Hazra  
v.  
King-Emperor.

coat claimed by Dinesh as his during the search of the room of Sasanka. The handwriting of this document has not been identified. The cipher list was not put to Jatindra Chandra Majumdar, who had been called to prove the handwriting of Dinesh on two post cards; but it transpired that the document had been shown by the Police to the witness outside Court; upon this, the defence made the legitimate comment that the document had not been put to the witness in Court, because he had failed to recognise the handwriting when it was shown to him outside. We observe, however, that notwithstanding these circumstances, the Sessions Judge proceeded in his judgment, to compare the document with the writing on the post cards, with a view to determine whether it was in the handwriting of Dinesh. This is a course which has not commended itself to high authority: *Barindra v. Emperor*<sup>1</sup>, *Kurali Prasad v. Anantaram*.<sup>2</sup> Whether the cipher list, however, was or was not written by Dinesh himself, is not very material for the present enquiry. It has been deciphered and turns out to be a list of names of persons, who apparently paid a small monthly subscription for some purpose undisclosed. The defence has suggested that this was probably a list of subscribers to the library which Sasanka kept in the room; it has also been urged that, in any event, the list does not connect Dinesh with any criminal conspiracy. This is perfectly true, yet one cannot but observe that it would have materially helped the case for the defence if Dinesh had offered a true explanation of the real nature and purpose of this apparently harmless document, instead of suggesting the very improbable theory that it had been planted in his coat pocket by an unscrupulous Police spy. In this connection reference may usefully be made to the following observations made by Tindal C. J. in *R. v. Frost*.<sup>3</sup> "On the part of the prisoner, the learned Counsel who appear for him state, and I think they are justified in so stating, that he is not bound to show what was the object or purpose or intent of the acts that were undoubtedly done by the prisoner at the bar. His Counsel say, the offence charged against him must be proved by those who made the charge, that he stands only to

<sup>1</sup> (1909) I. L. R. 37 Calc. 467 (503); 14 C. W. N. 1114 (1138).

<sup>2</sup> (1871) 8 B. L. R. 490 (502); 16 W. R. P. C. 16.

<sup>3</sup> (1839) 4 St. Tr. N. S. 85 (443); 9 C. & P. 129; 2 Moody C. C. 140.





hear the evidence that is given against him, and, therefore, he is not bound to show at all or in any way whatever, what his real object or design was. Undoubtedly, the proof of the case against the prisoner must depend for its support, not upon the absence or want of any explanation on the part of the prisoner himself, but upon the positive affirmative evidence of his guilt that is given by the Crown. It is not, however, an unreasonable thing, and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence." In this particular case, however, as we have already said, the document, though in cipher and thus calculate to excite suspicion, does not, when deciphered, incriminate the accused in whose possession it was found. Reference has lastly been made to the fact that the name of Dinesh appears in a list found at the search of the house of one Madan Mohan Bhoumik. This evidence is valueless, but the Sessions Judge has also correctly held that it is not admissible against the accused. Nothing is known of Madan or of his activities, except that his name appears among some disconnected memoranda contained in a note-book found in Sasanka's room, and the mere fact that Madan had chosen to enter the name of Dinesh in a list prepared by him for some unknown purpose, is obviously irrelevant for the purposes of this trial. On a review of the entire evidence, it is plain that the conspiracy charged against Dinesh cannot be supported.

1915

Amrita Lal Hazra  
v.  
King-Emperor.

\* \* \* \* \*

We may here conveniently deal with four important questions of law, raised and discussed before us in connection with the procedure adopted in the Court below, with regard to the examination of the witnesses and of the accused.

It appears that, in more than one instance, when the prosecution had called a witness to prove a particular point, (for instance, witnesses Rai Mohan Ray and Atul Chandra Das Gupta), the defence directed the cross-examination to



1915

Amrita Lal Hazra

King-Emperor.

matters wholly unconnected with the examination-in-chief, but yet relevant for the purposes of the trial. Two questions thereupon arose, *first*, whether in a cross-examination of this description, leading questions could be put to the witness, and, *secondly*, whether the prosecution were entitled to test, by way of cross-examination, the veracity of their own witnesses with regard to the matters elicited by the defence in cross-examination. The answer to these questions must depend upon the provisions of the Indian Evidence Act. Section 138 is in these terms: "Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then, (if the party calling him so desires) re-examined."

"The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief."

"The re-examination shall be directed to the explanation of matters referred to in cross-examination, and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

Section 143 provides as follows:—"Leading questions may be asked in cross-examination."

Section 154 is in these terms: "The Court may, in its discretion, permit the person, who calls a witness to put any question to him which might be put in cross-examination by the adverse party." It is consequently plain that the accused were entitled, in cross-examination, to elicit facts in support of their defence from the prosecution witnesses, though the facts thus elicited had no relation to the facts to which the witnesses had testified on their examination-in-chief. It is also plain that, in the course of cross-examination of this character, the defence was entitled, in view of the generality of the provision of section 143, to ask leading questions. It is finally obvious that the Court might, in its discretion, under Section 154, permit the prosecution to cross-examine the witness even though, he had been originally called by them, with regard to the matters elicited by the defence. Indeed, in such circumstances, it would be generally an improper exercise of discretion to refuse the prosecution an opportunity to





cross-examine the witness for the purpose indicated. This view is in accord with the law as administered in England. It has been ruled there that though leading question may, in strictness, be put in cross-examination, even though the witness be favourable to the cross-examiner [*Parkin v. Moon*<sup>1</sup>], yet when a vehement desire is betrayed to serve the interrogator, it is certainly improper and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back: *R. v. Hardy*<sup>2</sup>. Again, as the cross-examination is not limited to the matters upon which the witness has been examined-in-chief, but extends to the whole case, it would be obviously unfair, to allow the evidence brought out in cross-examination to pass unchallenged: *Morgan v. Brydges*<sup>3</sup>; *R. v. Murphy*<sup>4</sup>. The question was elaborately reviewed by Shaw C. J. in *Moody v. Rowel*<sup>5</sup> where the learned Chief Justice summed up his opinion as follows:—  
 “There is one authority directly in point, where the objection was taken, and it was decided by Lord Kenyon that such leading question is admissible: *Dickinson v. Shee*<sup>6</sup>. So, in several recent cases, it has been held that where a witness is called to a particular fact, he is a witness to all purposes and may be fully cross-examined to the whole case, and no distinction is suggested as to the mode of cross-examination: *Morgan v. Brydges*<sup>3</sup>; *R. v. Brooke*<sup>7</sup>. The weight of authority is in favour of the right to put leading questions under the circumstances stated, and this is confirmed by practice and experience.” As is pointed out in Taylor on Evidence (Art. 1432), in the United States the difficulty is avoided by the adoption of the logically consistent rule that a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his examination-in-chief, and if he wishes to examine him respecting other matters, he must do so by making him his own witness and by calling him as such in the subsequent progress of the cause. (See the judgment of the Supreme Court of the United States delivered by Mr. Justice Story in *Philadelphia and Trenton Railway Coy. v.*

1915

Amrita Lal Hazra  
 v.  
 King-Emperor.

<sup>1</sup> (1836) 7 C. & P. 409.<sup>2</sup> (1794) 24 St. Tr. 755.<sup>3</sup> (1818) 2 Stark 314.<sup>4</sup> (1841) 1 Arm. M. & O. 206.<sup>5</sup> (1835) 17 Pickering 490.<sup>6</sup> (1801) 4 Esp. 67.<sup>7</sup> (1819) 2 Stark 472; 20 R. R. 723.





1915.

Amrita Lal Hazra  
v.  
King-Emperor.

*Stimpson* <sup>1</sup>. The view we take is to some extent supported by the decision of the Judicial Committee in *Kalagurla v. Yarlagadda* <sup>2</sup>. It may finally be added that the matter is eminently one in the discretion of the trial Judge, and his decision is practically conclusive: *Price v. Manning* <sup>3</sup>; *Rice v. Howard* <sup>4</sup>.

In the course of the trial before the Sessions Judge, a persistent effort was made by the defence to elicit from individual prosecution witnesses whether he was a spy or an informer, and, also to discover from Police Officials the names of persons from whom they had received information. The Sessions Judge disallowed questions of this character, and, in our opinion the course he adopted was correct. In *R. v. Bernard* <sup>5</sup>, when objection was taken to a question put to a witness, whether he had gone to a certain place as a spy, Lord Campbell allowed the objection to prevail, on the ground that the question was not relevant, and that the witness was really called upon to draw an inference from facts within his knowledge. Again in *R. v. Smith O' Brien* <sup>6</sup>, it was ruled that disclosures made by informers, to the Government, the Magistracy or the Police, with the object of detecting and punishing offenders were privileged. Reference was made to the general rule formulated by Eyre C. J. in *R. v. Hardy* <sup>7</sup>: "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for detection of crimes, that those persons who are the channel, by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me that it is within the ordinary course to do it." It may now be taken as settled rule that witnesses for the Crown in criminal prosecutions undertaken by the Government are privileged from disclosing the channel

<sup>1</sup> (1840) 14 Peter 448.

<sup>2</sup> (1902) 6 C. W. N. 513.

<sup>3</sup> (1889) 42 Ch. D. 372.

<sup>4</sup> (1886) 16 Q. B. D. 681.

<sup>5</sup> (1858) 1 Fos. & Fin. 240; 8 St. Tr. N. S. 887 (935).

<sup>6</sup> (1849) 7 St. Tr. N. S. 2 (123).

<sup>7</sup> (1794) 24 St. Tr. 755 (808, 811).





through which they have received or communicated information : *R. v. Watson*<sup>1</sup> ; *R. v. Richardson*<sup>2</sup> ; *A. G. v. Briant*<sup>3</sup> ; *Marks v. Beyfus*<sup>4</sup> ; but it has been ruled that a detective cannot refuse on grounds of public policy to answer a question as to where he was secreted : *Webb v. Catehlove*<sup>5</sup>.

1915

Amrita Lal Hazra  
v.  
King-Emperor.

## NOTES.

The law of evidence with a view to ascertain individual rights and liabilities in particular cases determines the following questions (I) Relevancy of facts *i.e.* what sort of facts may be proved in order to establish the existence of the right, duty or liability defined by the substantive law. For the meaning of the word "relevancy" see Woodroffe on Evidence 6th Ed. p. 127. (II) Proof of facts, (III) Production of proof of relevant facts *i.e.* by whom and in what manner evidence must be produced by which any fact is to be proved. Part III of the Indian Evidence Act deals with the subject of the production of proof of relevant facts under following heads : (i) Burden of proof. (ii) Estoppel. (iii) Witnesses and their examination. (iv) Improper admission and rejection of evidence. Though the evidence of one witness is sufficient for the proof of any fact, that one witness must be a witness competent to testify. The competency of a witness is one thing and the power to compel him to give evidence, which is commonly known as the compellability of a witness is another. This compellability may be either (i) compellability to be sworn or affirmed (ii) compellability when sworn or affirmed to answer questions. Section 138 Evidence Act gives the order of examination of witnesses. See notes on this section in Woodroffe on Evidence. Section 141 Evidence Act defines "leading questions" and § 142 lays down the rule when such questions must not be asked and § 142 when they may be asked. Section 153 provides for the exclusion of evidence to contradict answers to questions testing veracity. For the principle on which this rule is based see Woodroffe on Evidence, 6th Ed. p. 886.

<sup>1</sup> (1817) 32 St. Tr. 1 (100).

<sup>2</sup> (1863) 3 Fos & Fin. 693.

<sup>3</sup> (1846) 15 M. & W. 169 ; 71 R. R. 610.

<sup>4</sup> (1890) 25 Q. B. D. 494.

<sup>5</sup> (1886) 3 Times L.R. 159.





## GOBINDA CHANDRA SHAHA AND ANOTHER.

v.

## DWARKA NATH PATITA.

[*Reported in 20 C. L. J. 455 s.c. 19 C. W. N. 489.*]

Civil.

1914

The judgment of the Court was delivered by

MOOKERJEE J.—This is an appeal on behalf of the plaintiffs, in a suit for ejectment of the defendant, on the allegation that he held as a tenant of the disputed premises from month to month and had failed to vacate the land in spite of service of notice to quit. The defendant resisted the claim on the ground that his tenancy had not been validly terminated. The Subordinate Judge has given effect to this contention and has dismissed the suit. On the present appeal, three points have emerged for consideration, namely, *first*, was the defendant, as alleged by the plaintiffs, a tenant from month to month, entitled only to fifteen days' notice to quit; *secondly*, was the notice in proper form; and, *thirdly*, was the notice served in accordance with law.

As regards the first question, the case for the defendant is that he took the premises from the commencement of the Bengali year 1306, that the rent was fixed at Rs. 275 a year, and that the period during which the tenancy was to continue was not settled. It is plain that the defendant became a tenant for one year only, for a rent of Rs. 275, because, under section 107 of the Transfer of Property Act, which was in force when the tenancy was constituted, a lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, could be made only by a registered instrument. The position, consequently, was that the tenancy would, in ordinary course, expire at the end of the year 1306. The tenant, however, continued in occupation, and the landlords accepted rent from him for 1307; in other words, the tenant held over, the legal effect whereof is deducible from section 116 of the Transfer of Property Act. That section—we quote only so much of it as is applicable to the present case—is in these terms: “if a lessee of property remains in possession thereof after the determination of





the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106." In the case before us, the lease was neither for agricultural nor for manufacturing purposes within the meaning of section 106, as the defendant had taken the property for a stationery shop. The lease was consequently renewed, *prima facie*, from month to month. The question next arises, whether there was "an agreement to the contrary" within the meaning of section 116. As was pointed out by Maclean, C. J. in *Troilokya Nath v. Sarat Chandra*<sup>1</sup>, the agreement mentioned means an agreement as to the terms of the holding over. Now, there is no proof of an express agreement as to the terms on which the tenant was to hold over. But it is argued that as the rent was originally agreed to be an annual rent, there was an implied agreement that if the tenant held over, he should hold over from year to year. This argument is obviously fallacious. Let us assume that the mode in which the rent is expressed to be reserved, for example, at so much a year, affords a presumption that the tenancy is of a character corresponding to it: *Wilkinson v. Hall*<sup>2</sup>; though it is plain that the rule is not of universal application and the presumption of a yearly taking does not always arise from the rent being payable yearly: *Atherstone v. Bostock*<sup>3</sup>; *Wilson v. Abbott*<sup>4</sup>. The argument for the defendant in substance is that the lease was for one year, coupled with an implied agreement that the tenant would hold over from year to year; that in substance would be a lease from year to year, which under section 107 could not be created except by a registered instrument. In fact, this is an ingenious attempt to substitute for a lease from year to year, a tenancy for one year coupled with an agreement to renew it from year to year: *Mati Lal v. Darjeeling Municipality*<sup>5</sup>. We hold accordingly that there was no "agreement to the contrary" within the meaning of section 116, and that after the expiry of the year for which the tenancy took effect, it was renewed

Civil.

1914.

Gobinda Chandra  
v.  
Dwarka Nath.

<sup>1</sup> (1904) I.L.R., 32 Calc. 123 (127).<sup>2</sup> (1824) 3 B. & C. 88.<sup>3</sup> (1837) 3 Bing. N.C. 508; 43 R.R. 728.<sup>4</sup> (1912) 17 C. L. J. 167.<sup>5</sup> (1841) 2 M. & G. 511; 10 L.J.C.P. 115.





Civil.

1914.

Gobinda Chandra  
v.  
Dwarka Nath.

from month to month: *Debendra Nath v. Syama Prosanna*<sup>1</sup>; *Durgi Nikarini v. Goberdhan Bose*<sup>2</sup>. Under section 106, this tenancy was terminable by the lessors by fifteen days' notice expiring with the end of a month of the tenancy.

As regards the second question, two objections have been taken to the form of the notice, namely, *first*, that the notice, which was dated the 16th Baishak 1318 and may, for the present purpose, be assumed to have been served on that date, called upon the defendant to vacate the premises 'within' (that is, not later than) the 31st Baishak, 1318; and *secondly*, that the notice was signed on behalf of the first plaintiff by one Bharat Chandra De. These objections are manifestly groundless. A notice served on the 16th Baishak which calls upon the tenant to quit on the 31st Baishak (the last day of that month) gives the tenant fifteen days' notice, excluding the day on which the notice is served and expiring with the end of a month of the tenancy. The case of *Subadini v. Durga Charan*<sup>3</sup>, upon which much stress has been laid by the defendant, is clearly distinguishable. In that case, the notice was served on the 16th Falgoon and required the tenant to quit the land on the 30th Falgoon. It was contended on behalf of the landlord that if the day on which the notice was served was taken into account, the tenant had fifteen days' notice. This contention was over-ruled, and it was held that he had only fourteen clear days' notice, while he was entitled under section 106 to fifteen clear days' notice. It is plain that the learned Judges took into account the day on which the notice was to expire and excluded from calculation only the day on which the notice was served. The learned judges plainly could not have intended to use the expression 'clear days' in its technical sense that the time is to be reckoned exclusive of both the first and last days: *R v. Herefordshire*<sup>4</sup>, *Liffin v. Pitcher*<sup>5</sup>. The judgment, taken as a whole, indicates conclusively that when they laid down that the fifteen days' notice mentioned in section 106 meant fifteen clear days' notice, they never intended to hold that, in calculating the fifteen days the day on which the notice is served, as also the date on which the notice expires are both to be excluded. This

<sup>1</sup> (1906) 11 C. W. N. 1124.<sup>4</sup> (1820) 3 B. & Ald. 581.<sup>2</sup> (1914) 20 C. L. J. 448.<sup>5</sup> (1843) 1 Dowling. N. S. 767.<sup>3</sup> (1900) 1 L. R. 28 Calc. 118;

4 C. W. N. 790.





is in accord with what may be taken as the well-settled rule on the subject: *Rex v. Grafton*<sup>1</sup>, *Doe v. Matthews*<sup>2</sup>; *Poole v. Warren*<sup>3</sup>. The contention that the notice was not a fifteen days' notice to quit must consequently be overruled. The second objection that the notice was not signed by the first plaintiff is equally untenable. Section 106 requires the notice to be in writing, signed by or on behalf of the person giving it. The notice in this case was signed by Bharat Chandra De, ammuktear of the first plaintiff Haridas Saha. The power of attorney has not been produced, but the defendant admitted that he was the ammuktear. The objection is clearly untenable, as the notice was signed by an authorised agent.

As regards the third question, we have to consider whether the notice was served in accordance with the second paragraph of section 106 which provides as follows: "every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property." In this case, attempt was made by the plaintiffs to comply with the requirements of the law by forwarding a notice to the defendant in a registered cover through the Post Office. The cover was ultimately returned to the plaintiffs by the postal authorities on the allegation that the addressee had refused to accept it. The cover with the notice contained therein, has been produced in the course of the trial. There is no oral evidence to show when the cover was posted, nor has the postal peon been examined to prove when and where the cover was tendered to the defendant. The only oral evidence on the subject is a statement by the agent of the plaintiffs, who pledges his oath that he had given notice by a registered cover. The defendant, on the other hand, asserted in the course of his deposition that the cover in question had never been tendered to him. In these circumstances, the question requires consideration whether the plaintiffs have proved that the notice was tendered either personally to the defendant or to one of his family or servants

Civil.

1914.

Gobinda Chandra  
v.  
Dwarka Nath.

<sup>1</sup> (1852) 18 Q. B. 496; 88 R. R. 678.      <sup>2</sup> (1851) 11 C. B. 675.

<sup>3</sup> (1838) 8 A. and E. 552 (587.)





Civil.

1914.

Gobinda Chandra  
v.  
Dwarka Nath.

at his residence, at least fifteen days before the expiry of the month of Baishak, that is, not later than the 16th Baishak. The evidence for the determination of this question, consists of the envelope and its contents (the notice). The notice, on the face of it, is dated the 16th Baishak 1318. The envelope is addressed to the defendant "Dwarkanath Patita, P. O. Narayanganj, Bhagawanganj Bazar, Nij Gadi." In a corner is the following endorsement: "from Madanganj, Gobindachandra Saha; (the second plaintiff). On the three postage stamps affixed to the envelope, we have what purport to be impressions of the seal of the Madanganj Post Office; each bears date the 29th April, 1911 which corresponds to the 16th Baishak 1318. We have also a very faint and almost illegible impression of the seal of the Narayanganj Post Office, dated the 29th April, 1911. We have further an impression of the seal of the Madanganj Post Office dated the 1st May, 1911. In addition, we have two endorsements on the cover in the following terms: (1) "This letter returned as the addressee refused to receive it. No. 5, 29th April, 1911." (2) "Refused and returned to sender J. C. G. 1st May, 1911."

The first of these endorsements is in Bengali, and the second is in English. The first point for determination is, when was the letter posted? There is, as we have said, no oral evidence on the subject, and we are left entirely to the post marks on the envelope. The use of a post mark in evidence involves at least three distinct principles. In the first place, the question arises, may it be inferred from the presence of what purports to be the official mark that the mark was genuinely affixed by an officer of the Post Office concerned. This is a question of authentication and may be answered in the affirmative, though there has been some fluctuation of judicial opinion on the subject. In *R. v. Johnson*<sup>1</sup>, an objection to the use of an Irish Post mark as evidence of a posting in Ireland, to the effect that "there was no evidence that either of the papers was received from the Post Office which might have been ascertained by the persons employed in that office," was not sanctioned. In *R. v. Watson*<sup>2</sup>, a post mark was held not sufficient to show posting at the place named. In *Arcangelo v. Thompson*<sup>3</sup>, a post

<sup>1</sup> (1805) 7 East 65 (66, 70.)<sup>2</sup> (1808) 1 Camp. 215.<sup>3</sup> (1811) 2 Camp. 620 (623).





mark was assumed genuine in proving receipt of a letter in a certain year. In *R. v. Plummer*<sup>1</sup>, Post Office marks were used to show that a letter came to a particular office, and similarly in *Hitchon v. Best*<sup>2</sup> a post mark was presumed to be genuine. In *Fletcher v. Braddyll*<sup>3</sup> a post mistress was called to identify a post mark. In *Abbey v. Lill*<sup>4</sup>, Gaselee, J. said: "Where it is disputed, it ought perhaps to be proved, though what might be deemed to amount to proof is not clear." In *Warren v. Warren*<sup>5</sup>, the Post master of one of the offices was called to prove the post mark. In *Shiply v. Tadhunter*<sup>6</sup> and *Stoken v. Collen*<sup>7</sup>, post marks were presumed genuine. But in *Wood Cock v. Houldsworth*<sup>8</sup>, it was said that some witness must prove the post mark. In the United States, there are cases in which post marks have been presumed genuine. *New Haven v. Mitchell*<sup>9</sup>, *Burgess v. Clark*<sup>10</sup>. The preponderance of judicial authority is in favour of the view that what purports to be the impression of a Post Office seal on an envelope which has been posted, may be presumed to be genuine, at any rate, where its genuineness is not expressly questioned. In the second place, the question arises, whether if the post mark be taken as genuine, it is evidence that the cover bearing it was stamped on the date the impression bears. The answer has been given in the affirmative. In *Canning's Trial*<sup>11</sup>, a post mark, verified as authentic by the clerk, was admitted to show that the cover passed through the office on the date of the mark. In *Fletcher v. Braddyll*<sup>3</sup>, a post mark was used to show that the letter existed on the date thereof. In *Abbey v. Lill*<sup>12</sup>, a post mark on the cover was used to show that the enclosed letter was wrongly dated. In *Stoken v. Collin*<sup>7</sup>, a post mark was used to show the hour of posting a notice. These cases show that the post mark, when proved or assumed to be genuine, implies an assertion that the date on the mark is the date of affixing it. In the third place, on the same principle, the post mark is evidence that the place or office mentioned therein was actually

Civil.

1914.

Gobinda Chandra  
v.  
Dwarka Nath.

<sup>1</sup> (1814) Russ. and Ry. 264.<sup>2</sup> (1819) 2 B. and B. 299.<sup>3</sup> (1821) 3 Stark 64.<sup>4</sup> (1829) 5 Bing. 299 (304).<sup>5</sup> (1834) 1 C. M. & R. 250.<sup>6</sup> (1836) 7 C. & P. 680 (686).<sup>7</sup> (1841) 7 M. & W. 515.<sup>8</sup> (1846) 16 M. & W. 124.<sup>9</sup> (1842) 15 Conn. 206 (225).<sup>10</sup> (1851) 3 Ind. 250.<sup>11</sup> (1754) 19 How. St. Trial 370.<sup>12</sup> (1829) 5 Bing. 298.





Civil.

1914

Gobinda Chandra  
v.  
Dwarka Nath.

the place where, it was affixed: *Canning's Trial* <sup>1</sup>, *R. v. Johnson* <sup>2</sup>. We may, consequently, infer from the date in the three post marks on the three postage stamps on the cover, that the letter was posted at Madangung on the 29th April, 1911. It is necessary to rely on the date in the post marks, because the mere fact that the notice is dated the 29th April, 1911 does not show that it must have been posted on the same date; as was said in *Phelan v. N. W. Mutual Life Ins. Co.* <sup>3</sup>, experience indicates no such uniform connection between the date of a letter and the time of its mailing as to raise an inference that a letter was posted on the day of its date. The next question, which requires consideration, is, when was the cover tendered to the addressee. For this purpose, it would be necessary to know the usual course of mail between the place of posting and the place of receipt, for the inference is, that the article posted was delivered in due course of post: *Pitts v. Hartford* <sup>4</sup>. We have here no evidence on the subject, and the Court cannot take as matters of public notoriety the running time of trains between two places on a particular day, the number of mail trains within a given time and other like facts involved in such an enquiry: *Wiggins v. Burkham* <sup>5</sup>. We are, therefore, obliged to rely upon the date in the post mark of the Narayanganj Post Office. This shows that the cover reached that office on the very date it was posted at Madangung i.e. 29th April, 1911; but it does not follow that it was tendered to the addressee on the same date; as was said in *Early v. Preston* <sup>6</sup>, the date of delivery of an article sent by mail cannot necessarily be inferred from the post mark of the receiving office; this observation applies with special force to registered articles which are delivered by the Post Office only between specified working hours. The plaintiffs are, consequently, driven to rely upon the vernacular endorsement on the cover, and this leads to the question, whether that endorsement is admissible in evidence. The endorsement is not signed; but it is urged that it must have been made by the peon No. 5 who was probably entrusted with the delivery of the letter to the

<sup>1</sup> (1754) 19 How. St. Trial 370.

<sup>2</sup> (1805) 7 East 65 (66).

<sup>3</sup> (1889) 113 N. Y. 147; 10 Am. St. Rep. 441.

<sup>4</sup> (1895) 66 Conn. 376; 50 Am. St. Rep. 96.

<sup>5</sup> (1869) 10 Wallace 129.

<sup>6</sup> (1855) 1 Patt & H. 228.





addressee. Assume the endorsement to be genuine, but still there remains the question, whether it is admissible in proof of the fact recited therein, namely, that the cover had been tendered to the addressee on the 29th April, 1911, and had been refused by him. This plainly is at best a record of a statement by the peon. Such a statement would have been admissible under section 32 (2) of the Indian Evidence Act, if it had been proved that the peon was dead or could not be found or had become incapable of giving evidence or that his attendance could not be procured without an unreasonable amount of delay or expense. No foundation, however, has been laid for the reception of the evidence under section 32 (2). The only other section which deals with statements by persons, who cannot be called as witnesses, namely, section 33, has no application. Nor can any assistance be derived from the group of sections relating to statements made under special circumstances. It cannot be argued with any show of reason that the endorsement is admissible, because it is a statement made by a public officer in the discharge of his duty; our attention has not been drawn to any provision of the Indian Evidence Act which would make a statement admissible on such a ground; indeed, if such a ground for admission of evidence was recognised, section 32 (2) would be superfluous. The inference follows, accordingly, that the vernacular endorsement on the cover mentioned above is not admissible in evidence in proof of the allegation that the cover was tendered to and refused by the addressee on the 29th April, 1911. But it has been argued that this view is opposed to the decision in *Jogendra Chunder v. Dwarka Nath*<sup>1</sup>. That case, however, if it be assumed to have been correctly decided, is clearly distinguishable. There a suit was brought for ejectment of a tenant of an agricultural holding, and the question arose whether the tenancy had been terminated, by service of notice to quit. The plaintiffs alleged that they had sent a notice to the defendant in a registered cover, duly posted, which had been returned to them by the postal authorities on the allegation that it had been refused by the addressee. The Courts below held that these facts were proved, but it does not transpire from the judgments, on what evidence this conclusion was based; both Courts, however, held

Civil.

1914.

Gobinda Chandra  
v.  
Dwarka Nath.

<sup>1</sup> (1888) I. L. R. 15 Calc. 681.





Civil.

1914.

Gobinda Chandra  
v.  
Dwarka Nath.

that there was no service of notice, as the defendant had not opened the letter and become acquainted with its contents. The plaintiffs appealed to the Court on the ground that the bare fact of refusal to take and open the registered cover did not entitle the defendant to plead non-service of notice. In the course of the argument for the appellants in this Court, reference was made by their Counsel to section 16 illus. (b) of the Indian Evidence Act and to the cases of *Papillon v. Branton*<sup>1</sup> and *Lootf Ali v. Pearce Mohun*<sup>2</sup>; the attention of the Court was also drawn to evidence of service of notice; we have not been able to ascertain what particular evidence of service had been given, as after this lapse of time the record must have been destroyed. On the evidence on the record and on the arguments mentioned, the Court made the following observation: "the service of the notice in another form (that is, other than service by actually handing the notice) was, however, proved, having been effected by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon it purporting to be by an officer of the Post Office stating the refusal by the defendant to receive the document. Upon the cases cited before us—*Lootf Ali v. Pearce Mohun*<sup>2</sup> and *Papillon v. Branton*<sup>1</sup>,—and having regard also to section 16 illus. (b) of the Evidence Act, we think that only a captious doubt could lead us to regard that service as insufficient." It has been argued that the learned judges held solely on what purported to be an endorsement by an officer of the Post Office that the cover had been tendered to and refused by the addressee. If the learned Judges intended to lay this down as a matter of law, it is worthy of note that the question of the admissibility of the endorsement was not argued before them; if there was evidence to show that the peon was dead or not available, the endorsement might be admissible under section 32 (2) of the Indian Evidence Act. In the absence of information as to evidence of service of notice to which the attention of the Court was drawn, we are not prepared to treat the decision as a binding authority in support of the proposition that an endorsement of the description now

<sup>1</sup> (1860) 5 H & N, 518.<sup>2</sup> (1871) 16 W. R. 223.





before us is admissible in evidence though the requisite conditions for admissibility mentioned in section 32 have not been fulfilled. We may further point out that the wide interpretation suggested by the plaintiffs is not justified by the authorities mentioned in the judgment. Illustration (b) to section 16 is in terms: "the question is, whether a particular letter reached A. The facts that it was posted in due course and was not returned through the dead letter office are relevant." This is very different from the assertion that if the letter is returned with a note thereon by the peon that it had been tendered to and refused by the addressee, the inference follows that it was so actually tendered and refused. The case of *Lootf Ali v. Pearce Mohun*<sup>1</sup> was decided before the Indian Evidence Act came into force and cannot be treated as an authority on the question of the admissibility of evidence under section 32(2); but the facts are so meagrely stated in the judgment that, even treated as such authority, it is quite inconclusive; all that appears is that one of the plaintiffs sent notice to the defendant in a cover which was refused by the addressee, came back to the hands of the sender and was produced in Court. What evidence there was on the point does not appear, but we have the following observation in another part of the judgment: "that letter was forwarded to him by post duly registered and we must presume that it was tendered to him; he therefore cannot take advantage of his refusal to take it." The case of *Papillon v. Branton*<sup>2</sup> was of a very different character. There the tenant posted a notice to the agent of the landlord on the morning of the 25th March, 1859. The agent was in his office until 6 to 7 o'clock in the evening; he did not receive the letter, but found it the next morning. The jury found upon all these circumstances that as the letter had been posted in the morning and had to be carried from Waterloo Place to the Temple, it must have reached the office of the agent the same evening, probably after he had left. An application was made to set aside this verdict, but the Exchequer Chamber declined to grant a Rule. This, again, is clearly a very different case from that of *Jogendra Chunder v. Dwarka Nath*<sup>3</sup>. It may be further observed that in a case under

Civil.

1914.

Gobinda Chandra  
v.  
Dwarka Nath.

<sup>1</sup> (1871) 16 W. R. 223.<sup>2</sup> (1860) 5 H. & N. 518.<sup>3</sup> (1888) 1 L. R. 15 Cal. 681.





Civil.

1914.

Gobinda Chandra  
v.  
Dwarka Nath.

the Transfer of Property Act, *Subadini v. Durga Charan*<sup>1</sup>, where reference is made to *Rajoni v. Hafisounissa*<sup>2</sup>, it was said that service of notice by a registered letter through the Post Office is not necessarily a non-compliance with the provisions of section 106, if there is evidence that the peon tendered or delivered the notice either personally to the party or to one of his family or to his servant. In both these cases, receipts signed by the addressees were produced, and that clearly was sufficient proof of good service. The case of *Ismail Khan v. Kali Krishna*<sup>3</sup> does not carry the matter further than *Jogendra Chunder v. Dwarka Nath*<sup>4</sup>. Finally, the decision in *Jogendra Chunder v. Dwarka Nath*<sup>4</sup>, is no authority for the proposition that the cover must be assumed to have been tendered to the addressee on the particular date, if any, which the endorsement may bear. Neither in *Jogendra Chunder v. Dwarka Nath*<sup>4</sup>, nor in *Lutf Ali v. Pearce Mohun*<sup>5</sup>, did any question arise as to the particular date on which the notice had been served. On that question, no assistance can be derived from the principle embodied in section 16 of the Indian Evidence Act, namely that when there is a question whether a particular act was done, the existence of any course of business according to which it naturally would have been done is a relevant fact. In the case before us, the plaintiffs can succeed only upon proof that on the 29th April, 1911, the cover was tendered either personally to the defendant or to one of his family or servants at his residence and was refused by the defendant. The vernacular endorsement is not admissible for this purpose and cannot be treated as evidence of the events recited therein. Nor would section 114 of the Indian Evidence Act and illustration (f) thereto, which are mentioned in the case of *Mir Tapurah Hossein v. Gopi Narayan*<sup>6</sup> be sufficient to remove the difficulty in the way of the plaintiffs; even if we presume it as likely that the cover was tendered to the addressee, we cannot assume that it was so tendered on the 29th April, 1911, yet such assumption is essential for the success of the plaintiffs. Proof of the fact that a letter correctly addressed has been posted and has not been received back

<sup>1</sup> (1900) I. L. R. 28 Calc. 118 ;

4 C. W. N. 790.

<sup>2</sup> (1900) 4 C. W. N. 572.<sup>3</sup> (1901) 6 C. W. N. 134 (137).<sup>4</sup> (1888) I. L. R. 15 Calc. 681.<sup>5</sup> (1871) 16 W. R. 223.<sup>6</sup> (1907) 7 C. L. J. 251 (258).





through the dead letter office may justify the presumption that it had been delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee; for it may well be that it has been returned because the addressee has not been found; much less is there a presumption that the cover has been tendered to the addressee on a particular date. We may further point out that the presumption mentioned in section 114 is not a presumption of law but a presumption of fact, and where, as in this case, the defendant pledges his oath that the cover was never tendered to him, we cannot treat the presumption of regularity of official business as conclusive against him. We have finally the not unimportant fact that the cover was addressed to the defendant at his *gadi* or place of business; there is nothing to show that was his residence within the meaning of section 106. We are, consequently, of opinion that the plaintiffs have failed to prove that the notice was duly served on the defendant.

The result is that the decree of the Subordinate Judge is confirmed and this appeal dismissed with costs.

*Appeal dismissed.*

#### NOTE.

One of the questions on which lawyers are often consulted is the question of notice to quit, whether 15 day's or a month's or a year's notice to quit should be given is an important question; answer to this question depends on the nature of the tenancy and the construction of § 116 and some other sections of the *Transfer of Property Act* (IV of 1882). After deciding the question of the period for which notice should be given, the lawyer will have to advise how the notice should be served in accordance with law and in this connection an important question of law of evidence, as in this case, may have to be decided. If the notice is not served personally, but sent through the post and comes back to the person who sent the notice with endorsements on the cover, to the effect that the letter was returned as the addressee refused to receive it, the question of admissibility of such endorsements as evidence and of interpretation of § 16 Illus. (b) of the *Indian Evidence Act* has to be decided, as has been done in this case. Proof of the fact that a letter correctly addressed has been posted and has not been received back through the Dead Letter Office may justify the presumption that it had been delivered in due course of mail to the addressee,

Civil.

1914

Gobinda Chandra  
v.  
Dwarka Nath.





Civil.

1914

Gobinda Chandra

v.

Dwarka Nath.

but proof of the fact that a letter has been duly posted and has been returned by the postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee. The presumption mentioned in §114 of the Indian Evidence Act is not a presumption of law but a presumption of fact, and where the addressee pledges his oath that the cover was never tendered to him the court cannot treat the presumption of regularity of official business as conclusive against him. On the question of interpretation of §32 (2) Indian Evidence Act several cases have been cited and distinguished, the points of difference between these cases should be carefully noted.

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